145-82

RECORD, CASE No. 13,284.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 223.

THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY AND THEODORE GILMAN AND CHARLES H. BULL, TRUSTEES, APPELLANTS,

vs.

SOLON HUMPHREYS AND THOMAS E. TUTT, RECEIVERS OF THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 13, 1888.

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1 *Stipulation.*

In the Circuit Court of the United States for the Eastern District of Missouri.

CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*, Respondents; Theodore Gillman and Charles H. Bull, Intervenors; Quincy, Missouri & Pacific Railway Company, Intervenor.

No. 2357 & 2464. Consolidated Cause. Master's No., 191. Clerk's No., 851. Master's No., 274. Clerk's No., 1227.

In the matter of the consolidated intervening petitions of Theodore Gillman and Charles H. Bull, trustees, and The Quincy, Missouri and Pacific Railroad Company for an order upon the receivers appointed herein to pay intervenors the sum of $114,380.00, the rental claimed to be due from said receivers for the use by them of the Quincy, Missouri & Pacific railway property, and the further sum of $16,000.00, being amount of taxes on said property paid by intervenors, and which it is claimed should have been paid by said receivers, and the further sum of $15,000.00, being amount expended by intervenors for putting the road in good repair.

Now come Theodore Gillman and Charles H. Bull, trustees, and The Quincy, Missouri and Pacific Railway Company and The Wabash, St. Louis and Pacific Railway Company, The Central Trust Company of New York, and James Cheney, trustee, and James F. Joy, O. D. Ashley, Thomas H. Hubbard, and Edgar T. Welles, trustees, and sometimes styled "Purchasing committee," and, for the purpose of simplifying the record in the above-entitled matter and saving the copying in full of the record in the above consolidated cause, stipulate and agree that the following abstracts and recitals of the record of proceedings in said consolidated cause are true and correct statements of said record and proceedings so far as the same pertain thereto, and may be taken and accepted by the
2 Supreme Court of the United States, in the hearing of the appeal from the final decree in said interventions, as of the same force and effect as if said record and proceedings were fully and at length embraced in the transcript of appeal herein; but these admissions are to be without prejudice to either party in any other proceedings or on any other occasion and are for the purpose of this suit only, and either party to this proceeding may for the purposes of said appeal bring up and insert in and as part of said abstracts

and recitals any other part of the record in the said "consolidated cause" that he may deem material.

THEODORE GILLMAN & CHARLES H. BULL,
Trustees, and
THE QUINCY, MISSOURI AND PACIFIC RAILWAY COMPANY,
By HOUGH, OVERALL & JUDSON, *Solicitors.*
WABASH, ST. LOUIS & PACIFIC R'Y CO.,
By WELLS H. BLODGETT, *Solicitor.*
SOLON HUMPHREYS & THOS. E. TUTT, *Receivers,*
By WELLS H. BLODGETT, *Solicitor.*
CENTRAL TRUST CO. OF NEW YORK & JAMES CHENY, *Trustees,*
By WELLS H. BLODGETT, *Solicitor.*
JAMES F. JOY, O. D. ASHLEY, THOS. HUBBARD, AND EDGAR T. WELLES, *Trustees,*
By WELLS H. BLODGETT, *Solicitor.*

Intervening Petition of Gilman & Bull.

On December 8th, 1885, the following intervening petition was filed in this cause:

Circuit Court of the United States for the Eastern District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK and Others, Plaintiffs, *vs.* THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY and Others, Defendants.	In Chancery. Consolidated Cause. No. 2464.

Theodore Gilman and Charles H. Bull respectfully repre-
3 sent to this court—

That they are the trustees of a certain mortgage executed and delivered on the 1st day of October, 1879, by the Quincy, Missouri & Pacific Railroad Company, one of the defendants in this cause, a corporation duly created and existing under the laws of the State of Missouri.

That in and by said mortgage all the railroad and the property thereof, including all and every valuable thing and things whatsoever which said company then had or might thereafter have, and the right to all tolls, rents, issues, income, and profits which might thereafter accrue to said company from any source whatever, was conveyed to your petitioners, whereby your petitioners became and are entitled to the rental hereinafter described and specified, a copy of which said mortgage is attached to and made part of complainants' bill in this suit, marked Sub-Exhibit F Number 35, and which your petitioners pray may be taken as part of this petition as fully as if set forth herein.

That under and in pursuance of the terms of said mortgage there were issued and are now outstanding and unpaid 1,204 of said bonds

in said mortgage described; that default was made in the payment of interest due on said 1,204 bonds on July 1, 1884, amounting to $26,120; that like installments of interest on said bonds fell due January 1, 1885, and July 1, 1885, and that no part of the said three installments of interest have been paid, and in consequence thereof your petitioners are now in this court by their suit seeking the foreclosure of said mortgage.

That by an indenture of lease made and executed by the said Quincy, Missouri & Pacific Railroad Company, dated the 21st day of August, 1879, a copy of which said lease is attached to and made part of complainants' bill in this suit, marked Sub-Exhibit F Number 34, the said company demised and leased to the Wabash
4 Railway Company for the term of ninety-nine years, renewable in like periods forever at the option of the lessee, the railroad of said Quincy, Missouri and Pacific Railroad Company as then owned and constructed or as thereafter it might be owned and constructed, including all its property, real and personal, together with all its powers, franchises, privileges, and rights as a corporation.

That under and pursuant to the terms of said lease the railroad and all other property of the said Quincy, Missouri & Pacific Railroad Company passed into the hands of the said Wabash Railway Company, which was thereafter consolidated with another railroad company under the name of the Wabash, St. Louis & Pacific Railway Company, one of the defendants herein.

That by the terms of said lease, as — reference thereunto being had will appear, the said Wabash Railway Company undertook to maintain, equip, and operate the railroad of the said Quincy, Missouri & Pacific Railroad Company, keep the same in good condition and repair, indemnify and save harmless the said Quincy, Missouri & Pacific Railroad Company from and against all damage and liability in connection with the operation of the same, and guarantee and pay the interest on the bonds secured by the mortgage whereof your petitioners are the trustees, at the rate of nine thousand dollars per mile for each mile of completed road.

That on the 27th day of May, 1884, while the said Wabash, St. Louis & Pacific Railway Company, as the successor of the said Wabash Railway Company, was in possession of the property of the said Quincy, Missouri & Pacific Railroad Company and was using and operating the same under the terms and conditions of the said lease, the said Wabash, St. Louis & Pacific Railway Company applied to this court for the appointment of receivers of its entire property, including the property held by it under
5 said lease of the Quincy, Missouri & Pacific Railroad Company; that upon and pursuant to said petition this court did, on the 27th day of May, 1884, appoint Solon Humphreys and Thomas E. Tutt receivers of the said railroads owned, operated, or leased by the said Wabash, St. Louis & Pacific Railroad Company and all the property of said company, and that the said receivers thereupon took possession and held, managed, and operated said railroads, including the railroad of the Quincy, Missouri & Pacific

Railroad Company, until the 1st day of August, 1885, on which date, under an order of this court, the railroad and property of the said Quincy, Missouri & Pacific Railroad Company was placed by the said receivers in the hands of your petitioners, as trustees of the mortgage aforesaid.

That under the terms of said lease and the guarantee therein contained of the interest on the bonds secured by the mortgage whereof your petitioners are the trustees an installment of interest became due on the 1st day of July, 1884, but neither the said Wabash, St. Louis & Pacific Railway Company nor said receivers have paid the same; that another installment of a like amount became due and payable as interest upon said bonds on the 1st day of January, 1885, and a third installment on the 1st day of July, 1885, and that no part of the said installments of interest due upon said bonds has been paid.

That in and by the order of this court appointing said receivers it was provided, among other things, as follows: "That said receivers also in like manner pay all rentals accrued or which may hereafter accrue upon all leased lines of said complainant, and for the use of all terminals or track facilities, and of such rentals or installments as may fall due from said complainant for use of any portion of road or roads or terminal facilities of any other
6 company or companies, and also for all rentals due or to become due upon rolling stock heretofore sold to complainant and partially paid for."

That there is now due and owing to the said Quincy, Missouri & Pacific Railroad Company or to the holders of the bonds secured by the mortgage whereof your petitioners are the trustees, up to the 31st day of July, 1885, the sum of $114,380 as rental of said Quincy, Missouri & Pacific Railroad Company and its property under the said guarantee of the interest upon said bonds which was made and given, as hereinbefore set forth, by the said Wabash, St. Louis & Pacific Railway Company.

That said amount of $114,380 is part of the necessary operating expenses of the said Wabash, St. Louis & Pacific Railway Company, and is a just charge against any moneys in the hands of said receivers arising from the incomes and earnings of the said Wabash, St. Louis & Pacific Railway Company, and is a lien superior and paramount to all mortgages on all the property of the said Wabash, St. Louis & Pacific Railway Company.

Wherefore your petitioners respectfully pray that this honorable court will make its order, whereby it will direct and order the said receivers to pay either to your petitioners or to the owners and holders of the bonds issued under the mortgage whereof your petitioners are the trustees the said sum of $114,380, being the rental due on account of the said lease of the Quincy, Missouri & Pacific Railroad Company, and that this court will decree that the said sum of $114,380 is a lien superior and paramount to all mortgages on all the property of the said Wabash, St. Louis & Pacific Railway Company.

And your petitioners will ever pray, &c.

THEODORE GILMAN &
CHARLES H. BULL, *Trustees*,
By HOUGH, OVERALL & JUDSON,
Their Solicitors.

D. H. CHAMBERLAIN, *Of Counsel.*"

7 The following is a copy of Sub-Exhibit "F" Number 35, referred to in said petition, except acknowledgments, which are in proper form:

SUB-EXHIBIT F No. 35.

"*First Mortgage — Quincy, Missouri and Pacific Railroad Company.*"

This indenture, made and entered into this first day of October, in the year of our Lord one thousand eight hundred and seventy-nine, between the Quincy, Missouri and Pacific Railroad Company, a corporation created and existing under and by virtue of the laws of the State of Missouri, party of the first part, and Solon Humphreys, of the city of New York, in the State of New York, and Orville H. Browning, of the city of Quincy, in the State of Illinois, parties of the second part:

Whereas the said Quincy, Missouri and Pacific Railroad Company is engaged in the construction of a railroad in the State of Missouri, commencing at a point on the Mississippi river opposite the city of Quincy, in the State of Illinois, and extending to a point on the Missouri river opposite the city of Brownville, in the State of Nebraska, in virtue of and under authority of the laws of said State of Missouri; and

Whereas, for the purpose of raising means for the construction and equipment of its said railroad, said company has resolved to borrow money to an amount not exceeding three millions of dollars, to be applied to the purposes aforesaid, and in order to secure the payment thereof has resolved to execute and issue certain bonds of said company as follows: Three thousand bonds, of one thousand dollars each, and numbered consecutively from one to three thousand, inclusive, each of said bonds to bear date the first day of October, A. D. 1879, and to be payable to the bearer, or, in case of registration,

8 to the registered holder thereof, on the first day of October, A. D. 1909, at the agency of said company in said city of New York, in United States gold coin of equal value to the present standard of such coin, and each of said bonds to bear interest from the first day of January, A. D. 1880, at the rate of six per cent. per annum, payable semi-annually on the first days of July and January in each year, in like gold coin, at the aforesaid agency of said company, free of United States taxes, such interest to be payable only upon presentation and surrender of the interest coupons to said bonds respectively annexed and representing such interest as such coupons respectively become due and payable, each of said bonds to be authenticated by and not to be obligatory upon said company until the certificate thereon endorsed, certifying that the same is one

of the series of bonds secured by this deed, is signed by the said parties of the second part or one of them; said bonds to be signed by the president and treasurer of said company and sealed with the corporate seal of said company, and the said interest coupons to be evidenced by the signature of the treasurer of said company engraved thereon:

Now, therefore, this indenture witnesseth: The the said The Quincy, Missouri and Pacific Railroad Company, in order to secure the payment of the aforesaid bonds and the interest thereon as aforesaid, and in consideration of the premises and the sum of one dollar paid to the said company by the said parties of the second part at the time of the sealing and delivery hereof, the receipt of which is hereby acknowledged, has granted, bargained, sold, transferred, and conveyed, and by these presents does grant, bargain, sell, transfer, and convey, unto the said parties of the second part and to the survivor of them and to their successors in the trusts hereby created and assigns—

All and singular the entire railroad of the said party of the first part, commencing at a point on the Mississippi river opposite the city of Quincy, in the State of Illinois, and extending to a point on the Missouri river opposite the city of Brownville, in the State of Nebraska, whether made or to be made, acquired or to be acquired, and its franchises, equipment, property, tools, and interests, that is to say—the lands and tenements, hereditaments, fixtures, goods, and chattels of said company; its property, rights, privileges, leases, and leasehold interests and estate of every nature and description; its rails, ties, fences, buildings, and erections; its right of way, cars, engines, tools, and machinery; its books, books of account, papers, vouchers, receipts, and claims of every description; its offices and office-furniture and fixtures, and all the property, rights, and franchises of any and every kind and description which the said party of the first part now has or owns or may hereafter acquire, including all and every valuable thing and things whatsoever which said company now has or may hereafter have, make, or hold, in law or equity, and the right to all tolls, rents, issues, income, and profits which may hereafter accrue to said company from any source whatever:

Provided, however, that this conveyance shall not include nor operate to transfer nor be held to prohibit said company from selling and conveying, free from the lien of this instrument, any land which said company now owns or may hereafter own which is not and cannot be advantageously used for any purpose incident to the management or business of said company or to the repair of its railroad, and upon request said parties of the second part or one of them shall duly release any such land so sold from the lien and operation of this deed.

Nor shall this conveyance be held to prohibit said company from applying any money or personal property belonging to said company to the construction and repair of its said railroad or its appurtenances, or to its current expenses, or to the purchase of necessary equipment, tools, and machinery or the

renewal or repair thereof, nor to prohibit said company from selling or disposing of, from time to time, such portions of the equipment, implements, tools, or machinery at any time held or acquired for the use of said company as may have become unfit for such use.

And the board of directors of said company may lawfully distribute to its stockholders such amount of its net annual income and profits as may remain after paying the interest on said bonds as the same shall become payable:

To have and to hold the said premises, property, rights, franchises, and estate hereby conveyed unto the said parties of the second part and to the survivor of them, and to the heirs and assigns of such survivor and their successors in said trusts, upon the trusts, limitations, and conditions following—that is to say:

That is the said The Quincy, Missouri and Pacific Railroad Company shall fail to pay the principal of said bonds and of every of them or any part thereof or any part of the interest coupons to the said bonds respectively annexed at any time when the same shall become due and payable according to the tenor of said bonds and coupons for the period of six months after proper demand of payment thereof at the place mentioned for the payment thereof, then and in either such case, at the election of said parties of the second part, the whole principal sum payable by the tenor of said bonds then outstanding and unpaid shall thereupon become and be at once due and payable in every respect the same as if that date had been specially named in said bonds for the maturity and payment thereof, and in such case, upon the written request of the holders of one-half of said bonds then outstanding, the said parties of the second part, the survivor of them, or their successor or successors in said trusts may enter upon and take possession of all or any part of the premises, property, and valuable thing hereby granted and conveyed, and, as the attorneys or attorney in fact, agents or agent, of said party of the first part, by themselves or their agents or substitutes duly constituted, have, use, and employ the same, making from time to time all needful repairs, alterations, and additions thereto; may collect and receive all tolls, freights, rents, income, issues, and profits of the same, and, after deducting all expenses of such use, repairs, alterations, and additions, apply the income and profits thereof to the payment of the principal and interest of all of said bonds remaining unpaid, and the said parties of the second part, the survivor of them or their successors in said trusts, upon the request in writing of the holders of one-half in amount of said bonds then outstanding and unpaid, shall cause all the said premises, property, franchises, rights, and valuable things hereby conveyed, or so much thereof as shall be necessary to pay the principal and interest of all of said bonds that may be then unpaid, to be sold at public aution at the city of New York, in the State of New York, or at the city of St. Louis, in the State of Missouri, or at the city of Quincy, in the State of Illinois, after first having given at least ninety days' previous notice of the time, place, and terms of such sale and of the property to be sold by causing such notice to be published in one news-

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paper of good circulation in each of said cities of New York, St. Louis, and Quincy, and upon such sale shall execute and deliver to the purchaser or purchasers thereof good and sufficient deed or deeds of conveyance for the same in fee simple; and the party or parties so making said sale shall, after deducting from the proceeds thereof all costs and expenses attending the said trusts, sale, and con-
12 veyance and of managing said property, apply so much of the said proceeds as may be necessary to the payment of the principal of said bonds and then due interest coupons, and anything remaining shall pay over and restore to said party of the first part, its successors or assigns.

But it is expressly provided that the holders of a majority in amount of said bonds may, in writing, instruct the said trustees, said parties of the second part, to declare the said principal to be due in case of default as aforesaid or to waive the right so to declare on such terms and conditions as to such holders shall seem proper, or may annul or reverse the election of said trustees; and such holders of a majority in amount of said bonds may, in writing, waive and instruct said trustees to waive or to enforce any forfeiture or any right of the bondholders by reason of any default of said party of the first part in the performance of any of the provisions or requirements of this deed:

Provided further, that no action of said trustees or of the bondholders in waiving any such default or forfeiture or otherwise shall extend to or be taken to affect any subsequent default or to change or impair any rights resulting therefrom.

And it is further covenanted and agreed by and between the parties to these presents that the said parties of the second part shall not nor shall either of them sign the certificate on the back of any of said bonds, certifying that the same is one of the series of bonds secured by this deed, except as follows: None of said bonds shall be so certified until the certificate of the president or chief engineer of said railroad company, duly verified by his oath or affirmation, shall be produced to and deposited with said parties of the second part or one of them showing that at least seventy-five miles of the line of the railroad of said company has been completed; whereupon, at
13 the request of said party of the first part, an amount of said bonds, not exceeding nine thousand dollars to the mile of such completed road—that is to say, not exceeding six hundred and seventy-five thousand dollars—shall be so certified by said parties of the second part or one of them and delivered to said party of the first part or its authorized agent; and thereafter, and as often as the like certificate of said president or chief engineer shall be produced to and deposited with said parties of the second part or one of them, showing that an additional portion or section of said line of railroad, not less then three miles in length, has been completed, then as each additional three miles shall be completed and so certified, at the request of said party of the first part, an amount of said bonds, not exceeding nine thousand dollars to the mile of such additional portion or section, shall be so as aforesaid certified by said parties of the second part or one of them and delivered to

said party of the first part or its authorized agent: Provided, that at no time shall the total amount of the bonds so certified exceed the rate of nine thousand dollars to the mile of such completed railroad.

And it is hereby mutually covenanted and agreed, and these presents are upon the express condition, that upon payment of the principal and interest of said bonds the estate hereby granted and conveyed to said parties of the second part shall be void, and the right to the premises, property, franchises, and valuable things hereby conveyed shall revert to and revest in said party of the first part, its successors and assigns, without any acknowledgment of satisfaction, reconveyance, re-entry, or other act; but upon the request of said party of the first part, its successors or assigns, the said trustees, the survivor of them, and his or their successor or successors in said trusts shall and will reconvey and release all said premises, property, franchises, and valuable things to said party of the first part, its successors or assigns.

And it is further hereby declared and agreed that, in case at any time thereafter the said trustees, said parties of the second part, or either of them or any trustee hereafter appointed shall die, resign, or be removed or become incapable or unfit to act in the said trusts, the holders of a majority in amount of the bonds hereby secured shall be, and they are hereby, authorized and empowered, by an instrument or instruments in writing under their respective hands and seals, to appoint a successor or successors to such deceased, resigned, removed, or incapable trustee or trustees, and such successor or successors when so appointed shall immediately, upon his or their acceptance of the trust, become vested with all the powers, authority, and estates held or possessed by the trustee or trustees to succeed whom he or they shall have been appointed without any further assurance or conveyance, and thereupon all the powers and authority hereunder and all the estate, right, title, and interest in the said premises, property, franchises, and valuable things of such deceased, resigned, removed, or incapable trustee or trustees shall wholly cease and determine; but, nevertheless, the surviving or continuing trustee, if there be such, and the trustee or trustees resigning or being removed, as herein provided, shall, upon the request in writing of the new trustee or trustees, execute and deliver to him or them all such conveyances and other instruments as shall be fit and expedient for the purpose of assuring to such new trustee or trustees the legal estate in and to the premises, property, franchises, and valuable things aforesaid.

And it is further declared and agreed that, in case the bondholders shall fail or omit to appoint a new trustee or trustees in the manner aforesaid within sixty days after such death, resignation, or removal of any trustee, application may be made by any holder or holders of said bonds to the aggregate amount of one hundred thousand dollars, in the name and on the behalf of all of the holders of said bonds or otherwise, upon reasonable notice to said party of the first part, its successors or assigns, and to the surviving or continuing trustee, if there be such, to any court of

competent jurisdiction for the appointment of a new trustee or trustees.

And it is further expressly understood and provided that the surviving or continuing trustees shall be fully empowered to execute all the purposes of the trust by this deed created until any vacancy caused by the death, resignation, or removal of any trustee shall be supplied as aforesaid.

And the said party of the first part further covenants that upon the request in writing of the said parties of the second part, the survivor of them, or his or their successor or successors in said trusts the said party of the first part shall and will execute and deliver to said parties of the second part, the survivor of them, and his and their successors all such further and other assurances and conveyances of and concerning the property, premises, rights, franchises, and valuable things of said party of the first part aforementioned and hereby intended to be conveyed as may be necessary or proper the more effectually to carry out and execute the intent of these presents and effectually in law and equity secure the payment of said bonds and the interest thereon.

And this is the first mortgage and constitutes the first lien upon the premises, property, railroad, franchises, and valuable things aforesaid of said party of the first part.

And the said parties of the second part hereby accept the
16 aforesaid trust, and covenant and agree to and with said party of the first part to execute the same upon the terms and conditions hereinbefore mentioned and provided.

In testimony whereof Henry Root, president, and Joseph G. Rowland, secretary, of said party of the first part, by order of the board of directors thereof, and also in conformity with resolutions duly passed and adopted at a meeting of the stockholders of said railroad company duly called and held on the 22d day of October, A. D. 1879, have hereunto set their hands and affixed the corporate seal of said company this 31st day of October, A. D. 1879; and said parties of the second part have hereunto set their hands and seals the day and year last above written.

Done and executed in duplicate.

[SEAL.]

HENRY ROOT, *President.*
JOSEPH G. ROWLAND, *Secretary.*
SOLON HUMPHREYS. [SEAL.]
ORVILLE H. BROWNING. [SEAL.]

Sub-Exhibit F Number 34, attached to and made part of complainants' bill in this cause, is as follows:

SUB-EXHIBIT F No. 34.

Lease of the Quincy, Missouri and Pacific Railroad.

This indenture, made this 21st day of August, A. D. 1879, by and between the Quincy, Missouri & Pacific Railroad Company, a corporation of Missouri, party of the first part, and the Wabash Rail-

way Company, a consolidated corporation of Ohio, Indiana, and Illinois, part- of the second part, witnesseth:

The party of the first part, in pursuance of a resolution of its board of directors adopted on the 21st day of August, A. D.
17 1879, and the further authorization of its stockholders thereto, and in consideration of the covenants and agreements on the part of the party of the second part hereinafter contained, does hereby let, demise, and lease unto the party of the second part, its successors and assigns, for the term of ninety-nine years from this date, renewable in like periods forever, at the option of the party of the second part, the railroad of the party of the first part, extending from the Mississippi river at West Quincy, in Missouri, westerly across the said State of Missouri to the Missouri river opposite Brownville, Nebraska, as now owned, constructed, or used or as at any time hereafter the said railroad may be owned, constructed, or used by the said party of the first part, together with all embankments, bridges, turnouts, side tracks, water tanks and fixtures, shops, engine or other houses, turn-tables, engines, cars, machinery, tools, rolling stock, lots, lands, buildings, offices, and all things, real and personal, now owned or used or that may hereafter be owned or used by the said party of the first part in connection with the said railroad, and everything appurtenant thereto, and all the franchises, powers, privileges, and chartered or other rights of the said party of the first part, so far as the same may be needful or advantageous to the said party of the second part as lessee of the premises above described: Provided that the rights of the party of the first part to any subscription or promise payable on the completion of any part of its railroad east of Milan is expressly reserved from the above:

To have and to hold the said demised railway and property, real and personal, and franchises as above provided unto the said party of the second part, its successors and assigns, to and for the full end and term of ninety-nine years from and after the date of these presents, and any and all renewals thereof forever, at the option
18 of the party of the second part, as above set forth.

And the said party of the first part further covenants that as fast as practicable it will extend and complete its said railroad from its present terminus at Novinger, in Adair county, to Milan, in Sullivan county, Missouri, or to some point on the line of the Burlington & Southwestern railroad in the vicinity of Milan; will have the same completed on or before the first day of January, 1880, and that none of the grades on the last-named part of said railroad, when completed, shall exceed sixty-six and two-thirds feet as a maximum to the mile, and that upon the completion of said last-named section or in any case at the date above named it will transfer the custody and control of said railroad entire, including all property hereby demised, to the said party of the second part.

And the party of the first part further covenants that immediately upon the execution of this lease it will transfer to the said party of the second part such an amount of the common stock of the party of the first part as shall vest in said party of the second

part a majority of all the stock issued by said party of the first part, so as to give to second party control of the said corporation party of the first part, and that said party of the first part will thereafter issue no more stock of any kind, except the preferred stock herein provided for; and, further, that it will provide vacancies for and elect to its board of directors at that date such and such number of persons, to be designated by the party of the second part, as shall, when so elected, constitute a majority of one in said board of directors.

The party of the first part further covenants that it will, as soon as practicable, execute and deliver its mortgage or deed of
19 trust conveying to suitable trustees, to be designated by the party of the second part, its entire railroad and other property above demised, in trust to secure its mortgage bonds to be issued thereunder in the sum of nine thousand dollars for each mile of its said line of railroad between the Mississippi and Missouri rivers, as above described, and will execute and deliver to said trustees the bonds above mentioned, in number and amounts as from time to time required, to be by them held and used as hereinafter set forth, which bonds shall bear date October first, 1879, and shall be each of the denomination of one thousand dollars, payable thirty years after date, with interest thereon at the rate of six per cent. per annum from the first day of January, A. D. 1880, payable semi-annually, and evidenced by interest warrants or coupons attached thereto, such interest and principal to be payable in gold coin of the United States, at the office or agency of the party of the second part in the city of New York.

Such mortgage shall also embrace suitable clauses of forfeiture and make provision that upon default in the payment of said interest or principal at any time for the period of six months, then, upon the written demand of the holders of a majority in interest of said bonds, the principal of said bonds shall become due and the said trustees shall proceed immediately to foreclose and sell said property.

And the party of the first part further covenants that it will, on or before the first day of January, 1880, cause the mortgage or deed of trust heretofore by it made and charged by way of lien upon the property above demised to be cancelled of record and the lien thereof fully discharged, and will cause all bonds which have been or may be hereafter issued under said mortgage to be cancelled and retired, and will cause all other indebtedness which is now or
20 may become secured upon said property by way of lien to be removed, so that the lien of the mortgage hereinabove provided to be made shall be prior and paramount and a first lien upon the entire railroad and property of the party of the first part as now or at any time to be constructed, and said trustees shall thereupon certify and return to said party of the first part nine thousand dollars of said bonds for each mile of said road then completed and no more, and from time to time thereafter shall further certify bonds of said series to the amount of nine thousand dollars and no more for each mile of said railroad which may be there-

after from time to time completed, and shall issue and deliver the same to the party entitled thereto in pursuance of this agreement.

And the party of the first part hereby authorizes the party of the second part, in its discretion, to extend and complete the construction of said railroad to its proposed terminus at Brownville aforesaid, and further covenants, as fast as any portion thereof shall be completed, to make payment to said party of the second part for the same, through the medium of said trustees, in first-mortgage bonds of said first party, to be of the same series as herein provided, to be made to the amount of nine thousand dollars per mile for the portion so completed, and to make further payment in the preferred stock of said party of the first part to an amount bearing the same proportion to the mileage so completed by the party of the second part as the preferred stock of the said party outstanding at the time of commencing said construction bears to the mileage previously completed by the party of the first part; and it is mutually understood and agreed by the parties hereto, with reference to the amount of such preferred stock to be previously issued, that the present outstanding indebtedness of said first party shall be liquidated
21 first by the use of the bonds above provided, to be issued to said party of the first part, and, second, by the issue of preferred stock to the amount of such indebtedness, after deducting therefrom the value of said bonds at ninety cents on the dollar, the approximate amount of such indebtedness remaining to be covered by such preferred stock being represented to be six hundred thousand dollars.

And in consideration of the premises the party of the second part hereby covenants and agrees that it will equip, maintain, and operate said railroad, keeping the same in good condition and repair for the full term of this lease and of any renewal thereof, and will indemnify and save harmless the said party of the first part from and against all damage and liability whatever in connection with the operation of the same, and will keep full and accurate accounts of all its earnings from the same, which shall at all times be open to inspection by the duly constituted agents or committees of the party of the first part.

And the said party further covenants that it will in each year set aside from said earnings and will apply as hereinafter provided a sum proportionate to the gross sum thereof, as follows:

For each year in which said gross earnings shall be six hundred thousand dollars or more the proportion so set apart and applied shall be thirty per cent. thereof. For each year in which the gross earnings shall be less than six hundred thousand dollars and not less than four hundred thousand dollars the proportion so set apart shall be twenty-five per cent. thereof. For each year in which the said gross earnings shall be less than four hundred — dollars the proportion so set aside shall be twenty per cent. thereof.

The party of the second part further covenants to pay all lawful taxes and assessments levied on said property while held by it under this lease.

22 The party of the second part further covenants that it will guarantee and pay the interest on said bonds at the rate of nine thousand dollars per mile as aforesaid for each mile of completed road and will evidence said guaranty by proper stipulation endorsed on said bonds, charging the amount so paid by it in each year to the percentage of gross earnings arising in that year and applicable as aforesaid to the payment of rent upon the property above demised: Provided that if in any year the said percentage shall be less than the amount required to pay said interest for that year, than the party of the second part shall defray, at its own cost, the deficiency for that year, which deficiency shall not be chargeable to any overplus arising from the earnings of any other year; and in the event that by failure on the part of said second party to pay said interest the principal of said bonds shall become due as aforesaid, the same shall, at the option of the party of the first part, work a forfeiture of this lease, and thereupon the said party of the first part, by its officers, agents, or committee, shall be entitled to re-enter and take possession of all and singular the premises above described without process of law.

It is further mutually agreed that whatever excess shall at any time remain after payment of the interest as aforesaid upon the bonds outstanding in that year shall be forthwith applied and paid by the party of the second part:

First, by *pro rata* distribution in the way of dividend to the owners of the preferred stock above mentioned, an amount not exceeding six per cent., and afterwards to the owners of the common stock above mentioned *pro rata* until the percentage aforesaid of gross earnings for that year shall be entirely absorbed: Provided

23 that if such excess for any year shall be more than sufficient for a dividend of six per cent. on both common and preferred stock, then such dividend shall for that year be paid to both classes alike, it being expressly understood that the percentage of gross earnings for each year is to be treated by itself and not to affect the distribution of gross earnings for another year.

It is further mutually covenanted and agreed that the part- of the second part is and shall be entitled to build and complete at any time the whole or any part of so much of the railroad covered by the charter of the party of the first part as lies between Milan, in Missouri, and Brownville, in Nebraska, and that the party of the second part will proceed therewith as fast as in its judgment any part thereof can be so operated as to yield a net return, which shall be equal to the interest upon nine thousand dollars per mile in the six per cent. bonds above described. For every mile of such road so completed there shall be paid to the party of the second part by the party of the first part:

First, nine thousand dollars per mile in said six per cent. bonds; second, an amount of preferred stock of the party of the first part which shall bear the same proportion to the mileage of that part of said railroad for the construction of which the same is paid to the party of the second part as the whole of the preferred stock pre-

viously issued bears to the whole of the mileage previously completed.

The party of the second part further covenants that for the purpose of enabling said first party to complete the railroad to Milan or vicinity, as above provided, it will immediately, upon the execution of this lease, supply means for the completion of said railroad from its present terminus to the town of Milan or vicinity to the amount of one hundred and twenty-five thousand dollars and no more, it being expressly understood and agreed by the party of the first part that all payments from said
24 fund for labor and supplies are to be upon vouchers, certified to the satisfaction of the party of the second part, that the same have been actually applied to the construction and completion of that part of said railroad aforesaid, and that all iron, rails, spikes, and splice-bars for said extension shall be purchased by C. H. Bull, as common agent of the parties hereto; but such purchases shall be in the name of the party of the second part, and the property so purchased shall be and remain the property of the party of the second part, in its possession and under its control, until the same shall have been actually used in the completion of that part of said railroad last above named: Provided, however, that the sum of ten thousand dollars from the amount above mentioned shall be paid directly to the said C. H. Bull, the common agent as above, and used by him for other purposes connected with this lease; and provided further that if, on completion of said railroad to Milan or to the point of intersection above named, any part of such advance shall remain unapplied, then such remainder shall be paid over and belong to the party of the first part; and provided further that before any part of such advance is paid the said first party shall execute and deliver to said second party, as evidence of such indebtedness and as security therefor, the promissory note of said first party for said sum of one hundred and twenty-five thousand dollars, payable five months after date of the order of said second party, with seven per cent. interest from date, and shall further deposit as collateral thereto three hundred and fifty of the bonds of the said first party of the denomination of one thousand dollars each and of the series now outstanding and secured by deed of trust or mortgage on said first party's railroad and appurtenances, the second party, however, agreeing to receive in payment of said note bonds of said party of the first part of the series hereinabove provided to be guar-
25 anteed by the party of the second part, provided this agreement shall meantime be consummated by completion *to* said railroad to Milan or vicinity and transfer to said party of the second part, as above stipulated; and provided further that the agreed value at which said bonds shall be received shall be ninety cents on the dollar.

And it is further mutually understood and agreed that in case it shall any time appear that the preferred stock hereinabove provided for cannot be lawfully issued or has been issued without due authority of law, then and in that case the parties holding or entitled to receive said preferred stock shall receive in lieu thereof income

bonds of the party of the first part of the same tenor and date as the mortgage bonds above provided for, but upon which the interest shall be payable only from such sums and to such amount as the holders of such preferred stock would otherwise have been entitled to have distributed to them. The said bonds shall further authorize each holder thereof to vote at all elections and meetings of the corporation, party of the first part, the same as if the holder of said bonds were owner of an amount of its share capital equal to the par value of the bonds held by him.

In testimony whereof the corporations above named have caused their respective signatures and seals to be affixed hereto by their presidents and secretaries the day and year above written.

(Signed) HENRY ROOT,
[SEAL.] *President of the Quincy, Missouri and Pacific R. R. Company.*

J. G. ROWLAND,
[SEAL.] *Secretary of the Quincy, Missouri and Pacific R. R. Company.*

THE WABASH RAILWAY COMPANY,
By A. L. HOPKINS, *Vice-President.*

Attest: W. B. CORNEAU, *Secretary.*

26 STATE OF ILLINOIS, } *ss:*
County of Adams, }

Be it remembered that Henry Root, who is personally known to the undersigned, county clerk in and for the county aforesaid, to be the person whose name is subscribed to the foregoing instrument, and who is also known to me to be the president of the Quincy, Missouri and Pacific Railroad Company, this day appeared before me and acknowledged that he executed and delivered the same as the act and deed of the said Quincy, Missouri and Pacific Railroad Company for the uses and purposes therein contained, being thereunto legally authorized by the same company, as will fully appear by the records of said office kept at Quincy, in the State of Illinois.

Given under my hand and official seal this 21st day of August, A. D. 1879.

[Seal of Adams County, Illinois]

WILLIS HASSELWOOD,
County Clerk.

On January 13th, 1886, the following answer was filed by the receivers:

Answer of Receivers to Intervening Petition of Gilman & Bull.

"In the Circuit Court of the United States for the Eastern District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*, Defendants.	Consolidated Cause. Nos. 2357 and 2464. In Equity.

The answer of Solon Humphreys and Thomas E. Tutt, receivers of the Wabash, St. Louis and Pacific Railway Company, to the intervening petition of Theodore Gilman and Charles H. Bull.

27 Said receivers, saving and reserving unto themselves now and at all times hereafter all and all manner of benefit and advantage of exception which can or may be had or taken to said intervening petition, for answer thereunto or to so much or such parts thereof as they are advised is in anywise material for them to make answer unto, answering, say:

1. They admit it to be true, as averred in said intervening petition, that said intervenors are the trustees of a certain mortgage executed and delivered on the first day of October, 1879, by The Quincy, Missouri and Pacific Railroad Company, one of the defendants in this cause, a corporation duly created under the laws of the State of Missouri.

2. They admit that Sub-Exhibit 'F' Number 35 in the volume of exhibits on file in this cause is a true copy of the instrument of writing therein set forth, and that said instrument was duly executed as averred in said intervening petition.

3. They admit that under and in pursuance of the terms of said mortgage there were issued and are now outstanding and unpaid 1,204 of said bonds in said mortgage described, and that default was made in the payment of interest due on said 1,204 bonds on July 1st, 1884, January 1st, 1885, and July 1st, 1885, as averred in said intervening petition.

4. They admit that Sub-Exhibit 'F' Numbered 34 of the volume of exhibits on file in this cause is a true copy of the instrument of writing therein set forth, and that said instrument was duly executed as averred in said intervening petition.

5. They admit that on the 10th day of November, 1879, the Wabash Railway Company, a corporation organized under the laws of Ohio, Indiana, and Illinois, was consolidated with the St. Louis, Kansas City and Northern Railway Company, a corporation of Missouri, forming The Wabash, St. Louis and Pacific Railway

28 Company, defendant herein.

6. They admit that on the 27th day of May, 1884, said Wabash, St. Louis and Pacific Railway Company was in possession of the property of and was then operating the Quincy, Missouri and Pacific railroad, as averred in said intervening petition.

7. They admit that on said 27th day of May, 1884, Solon Humphreys and Thomas E. Tutt were duly appointed by this honorable court receivers of said Wabash, St. Louis and Pacific Railway Company, and that said receivers thereupon took possession and held, managed, and operated said Quincy, Missouri and Pacific railroad until the 1st day of August, 1885, on which date, under an order of this court, the railroad and property of the said Quincy, Missouri and Pacific Railroad Company was placed by said receivers in the hands of said intervenors as trustees.

Said receivers deny each and every other allegation in said intervening petition therein contained and set forth.

Further answering, said receivers say that the earnings of said Quincy, Missouri and Pacific railroad were never at any time since said railroad was operated by said Wabash, St. Louis and Pacific Railway Company and said receivers sufficient to pay its operating expenses, fixed charges, and interest on its bonded indebtedness, and that said Quincy, Missouri and Pacific Railroad Company is now justly indebted unto said Wabash, St. Louis and Pacific Railway Company and said receivers for the amounts expended by said company and said receivers in operating said railroad over and above the earnings thereof, and that said Wabash, St. Louis and Pacific Railway Company and said receivers were compelled to and did divert the earnings of other portions of the lines composing the Wabash system from that portion of said line where the same
29 was earned to paying said excess of operating expenses over said earnings of said Quincy, Missouri and Pacific railroad.

Wherefore, having fully answered, said receivers pray to be hence discharged with their costs in this behalf expended.

SOLON HUMPHREYS,
THOMAS E. TUTT, *Receivers*,
By WELLS H. BLODGETT, *Solicitor*."

On June 12th, 1886, the following intervening petition was filed herein:

Intervening Petition of Quincy, Missouri & Pacific R. R. Co.

"United States Circuit Court for the Eastern District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK and Others, Complainants,	Consolidated Cause.
vs.	No. 2464. In Equity.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY and Others, Defendants.	

The Quincy, Missouri & Pacific Railroad Company respectfully represents to this court—

That it is a corporation duly created and existing under the laws of the State of Missouri and one of the defendants in this cause.

That by an indenture of lease made and executed by your petitioner, the said Quincy, Missouri & Pacific Railroad Company, dated August 21st, 1879, a copy of which said lease is attached to

and made part of complainants' bill in this suit, marked Sub-Exhibit 'F' Number 34, your petitioner demosed and leased to the Wabash Railway Company for the term of ninety-nine years, renewable in like periods forever at the option of the lessee, the
30 railroad of your petitioner as then owned and constructed or as thereafter it might be owned or constructed, including all its property, real and personal, together with all its powers, franchises, privileges, and rights as a corporation.

That under and pursuant to the terms of said lease your petitioner had issued and there were outstanding on January 1st, 1884, its twelve hundred and four bonds of the denomination of one thousand dollars each, bearing interest at the rate of 6 per cent. per annum, payable semi-annually on the first days of January and July in each year, secured by a first mortgage or deed of trust on all the railroad and property of your petitioner, the said bonds having been issued, as provided in said lease, at the rate of nine thousand dollars per mile for each mile of your petitioner's completed road, your petitioner having, prior to said January 1st, 1884, completed its said road from the Mississippi river at West Quincy, in the State of Missouri, westerly across the State of Missouri, a distance of one hundred and thirty-four miles.

That under and pursuant to the terms of said lease the railroad and all other property of your petitioner passed into the hands of said Wabash Railway Company, which was thereafter consolidated with another railroad company under the name of The Wabash, St. Louis & Pacific Railway Company, one of the defendants herein.

That by the terms of said lease, as, reference thereunto being had, will appear, the said Wabash Railway Company undertook to maintain, equip, and operate the railroad of your petitioner, keep the same in good condition and repair, indemnify and save harmless your petitioner from and against all damages and liability in connection with the operation of the same, pay all lawful taxes and assessments levied on said property while held by it under said lease, and guarantee and pay the interest on the said
31 bonds issued by your petitioner as aforesaid at the rate of nine thousand dollars per mile for each mile of completed road.

That on May 27th, 1884, while the said Wabash, St. Louis & Pacific Railway Company, as the successor of the Wabash Railway Company, was in possession of the property of your petitioner and was using and operating the same under the terms and conditions of the said lease, the said Wabash Company applied to this court for the appointment of receivers of its entire property, including the property held by it under said lease of your petitioner, and upon and pursuant to said petition this court did, on said May 27th, 1884, appoint Solon Humphreys and Thomas E. Tutt receivers of the said railroad owned, operated, or leased by the said Wabash, St. Louis & Pacific Railway Company and all the property of said company, and that the said receivers thereupon took possession and held, managed, and operated said railroads, including the railroad of your petitioner, until August 1st, 1885, on which date, under and order of this court, the railroad and property of your petitioner *was* placed

by the said receivers in the hands of Theodore Gillman and Charles H. Bull, who are the trustees in the said mortgage or deed made by your petitioner as aforesaid to secure said twelve hundred and four bonds.

That under the terms of said lease and the guaranty therein contained of the interest on the twelve hundred and four bonds of your petitioner secured by the mortgage or deed of trust aforesaid an installment of interest became due on July 1st, 1884, amounting to the sum of thirty-six thousand one hundred and twenty dollars, and on January 1st, 1885, another installment of a like amount became due and payable as interest upon said bonds, and on July 1st, 1885, another installment of a like amount became due and payable as interest upon said bonds; but neither the said
32 Wabash, St. Louis & Pacific Railway Company nor said receivers have paid the same nor have they paid the portion of interest accrued on said bonds for the month of July, 1885, amounting to the sum of six thousand and twenty dollars.

That the lawful taxes and assessments on the said leased property of your petitioners for the year 1884 amounted to the sum of sixteen thousand dollars, no part of which has been paid by said Wabash, St. Louis & Pacific Railway Company, but has been paid out of the earnings of the property of your petitioner while in the hands of said Hillman and Bull.

That said receivers, Humphreys and Tutt, did not keep the said leased property of your petitioner in good condition and repair, but permitted the same to become so worn and injured that said Hillman and Bull, out of the earnings of your petitioner's said property, were compelled to expend the sum of fifteen thousand dollars to repair said property and make the same safe for use and travel.

That in and by the order of this court appointing said receivers it was provided, among other things, as follows: 'That said receivers also in like manner pay all rentals accrued or which may hereafter accrue upon all leased lines of said complainant (The Wabash, St. Louis & Pacific Railway Company), and for the use of all terminals or track facilities and of such rentals or installments as may fall due from said complainant for use of any portion of road or roads or terminal facilities of any other company or companies, and also for all rentals due or to become due upon rolling stock heretofore sold to complainant and partially paid for.'

That there is now due and owing to your petitioner up to July 31st, 1885, the sum of $114,380.00 as rental of said property under the said guaranty of the interest upon said bonds which was
33 made and given, as hereinbefore set forth, by the said Wabash, St. Louis & Pacific Railway Company, and the sum of sixteen thousand dollars taxes on said property paid by your petitioner, and the sum of fifteen thousand dollars necessarily expended by your petitioner as aforesaid to put said property in good codition and repair.

That said sums of $114,380 and $16,000 and $15,000 are part of the necessary operating expenses of the said Wabash, St. Louis & Pacific Railway Company, and are just charges against any moneys

in the hands of said receivers arising from the income and earnings of the said Wabash, St. Louis & Pacific Railway Company, and are liens superior and paramount to all mortgages on all the property of the said Wabash, St. Louis & Pacific Railway Company.

Whereupon your petitioner respectfully prays that this honorable court will make its order whereby it will direct and order the said receivers to pay to your petitioner the said sum of $114,380 and $16,000 and $15,000, being the rental due on account of the said lease of the property of your petitioner, and that this court will decree that the said sums of $114,380 and $16,000 and $15,000 are liens superior and paramount to all mortgages on all the property of the said Wabash, St. Louis & Pacific Railway Company.

And your petitioner will ever pray, etc.

QUINCY, MISSOURI & PACIFIC RAILWAY COMPANY,
By HOUGH, OVERALL & JUDSON, *Its Solicitors.*

WM. McFADEN, *Of Counsel.*"

On June 28th, 1886, the following answer to last-mentioned petition was filed:

34 "In the Circuit Court of the United States for the Eastern District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants,
vs.
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*, Defendants. } In Equity.

The answer of Solon Humphreys and Thomas E. Tutt, receivers of the Wabash, St. Louis and Pacific Railway Company, to the intervening petition of the Quincy, Missouri and Pacific Railway Company.

Said receivers, saving and reserving unto themselves now and at all times hereafter all and all manner of benefit and advantage of exception which can or may be had or taken to said intervening petition, for answer thereto or to so much and such parts thereof as they are advised is material for them to make answer unto, answering, say:

1. They admit that said intervenor is a corporation, duly created and existing under the laws of Missouri, and one of the defendants in this cause, as averred in said intervening petition.

2. They admit the execution of the lease, as set forth and described in said intervening petition.

3. They admit that the terms and conditions of said lease are correctly described and set forth in said intervening petition.

4. They deny that the Wabash, St. Louis and Pacific Railway Company or these receivers are indebted to said intervenor in the sum of $114,380, the sum of $16,000, and the sum of $15,000, as

averred in said intervening petition, or in any other sum whatever.

35 5. They aver the fact to be that long prior to their appointment as receivers, as well as subsequent thereto, the earnings of the Quincy, Missouri and Pacific Railway Company were wholly insufficient to pay the operating expenses, fixed charges, and taxes, and that said Quincy, Missouri and Pacific Railway Company is justly indebted unto said Wabash, St. Louis & Pacific Railway Company and these receivers in a large sum in excess of the earnings of said railway, expended by said Wabash, St. Louis and Pacific Railway Company and these receivers in the operation of said Quincy, Missouri and Pacific railway.

6. Wherefore they pray that an accounting may be had in this court as to the excess of expenses over earnings of said Quincy, Missouri and Pacific Railway Company, and that said intervenor be required, under proper orders of this court, to repay to said Wabash, St. Louis and Pacific Railway Company and these receivers the amounts so expended by it and them in operating said line of railway at a loss as aforesaid, and for such other and further relief as prayed for in said cross-bill and as to equity may appertain.

Wherefore, having fully answered, said receivers pray to be hence discharged with their costs in this behalf expended.

SOLON HUMPHREYS,
THOMAS E. TUTT, *Receivers,*
By H. S. PRIEST,
GEO. S. GROVER, *Solicitors.*"

On April 11th, 1887, the special master to whom the above intervening petition of Quincy, Missouri & Pacific railroad had been referred made the following order:

Master's Order.

" Pursuant to adjournment, as above stated, on April 11th, 1887, the intervenor appeared, by Messrs. Hough, Overall & Judson, and the receivers, by George S. Grover, Esq., and the intervention was submitted on the pleadings and all other papers filed in the cause material to any of the issues raised in the petition and answer."

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On April 18th, 1887, the special master, to whom the above intervening petition of Gilman & Bull, trustees, had been referred, made the following order:

" Pursuant to adjournment, as above stated, on April 18th, 1887, the receivers appeared by George S. Grover, Esq., and the intervenors by John H. Overall, Esq., who asked that this case be consolidated with the case of The Quincy, Missouri & Pacific Railroad Company, intervenor—master's No., 274—and submitted on the pleadings and all papers, including the original petition, exhibits, and receiver's reports filed in the cause."

It is admitted that on December 31st, 1885, the trustees, Gilman

& Bull, paid the taxes on said property for the year 1885, amounting to $16,358.01.

On the 2nd day of May, 1887, the said special master, to whom had been referred the foregoing intervening petitions, lodged with the clerk of said court in said cause the following report:

Master's Report.

In the Circuit Court of the United States for the Eastern District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants,
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*, Defendants; Theodore Gilman and Charles H. Bull, Intervenors; Quincy,
37 Missouri & Pacific Railroad Company, Intervenor.

In Chancery.
No. 2357, No. 2464.
(Consolidated.)
Master's No., 191.
Clerk's No., 851.
Master's No., 274.
Clerk's No., 1227.

To the honorable judges of the United States circuit court for the eastern district of Missouri:

In pursuance of orders of reference to me as special master of the intervening petition of Theodore Gilman and Charles H. Bull, which was filed December 8th, 1885, and of the Quincy, Missouri & Pacific Railroad Company, which was filed on June 12th, 1886, I was present at the witness-room in the custom-house building, in the city of St. Louis, to hear evidence, if any, relative to said petitions, on the days stated in the records of proceedings herewith filed, and the hearings were continued from time to time as therein stated.

The intervening petitions above mentioned have reference to substantially the same subject-matter and may be advantageously considered in one report.

I find from the pleadings and evidence before me that at the date when the receivers were appointed herein the Wabash, St. Louis and Pacific Railway Company sustained the relation of lessee of the Quincy, Missouri and Pacific railroad, and as such lessee was under legal obligation to pay the interest, as it matured, upon 1,204 outstanding bonds of the Quincy, Missouri and Pacific Railroad Company, secured by a deed of trust executed by the last-named company, in respect of which Theodore Gilman and Charles H. Bull, the intervenors above named, were the trustees. Their petition prays for an order on the receivers requiring payment, either to them as trustees or to the owners and holders of the bonds aforesaid, of the sum of $114,380, the amount of interest due on said bonds August
38 1st, 1885, the date when, on their application, possession of said leased railroad was surrendered to said intervenors as trustees as aforesaid, and said petition further prays the court to decree that the sum above named "is a lien superior and paramount to all mortgages on all the property of the said Wabash, St. Louis & Pacific Railway Company."

The petition of the Quincy, Missouri and Pacific Railroad Company prays for the payment to it of the same sum of $114,380 on account of interest, and also of the sum of $16,000, being the taxes on said property for the year 1884, which it is alleged the receivers should have paid under the terms of the lease, and the trustees Gilman and Bull did pay after taken possession of the property, and also for the sum of $15,000, which it is alleged said trustees were obliged to pay because the receivers herein did not keep the property in good repair, as required by the lease; and said petition also prays a decree that all of said sums "are liens superior and paramount to all mortgages on all the property of the said Wabash, St. Louis & Pacific Railway Company."

Both petitions recite and seem to be based upon the following clause in the order of this court appointing the receivers herein, viz:

"That said receivers also in like manner pay all rentals accrued or which may hereafter accrue upon all leased lines of said complainant, and for the use of all terminals or track facilities and of such rentals or instalments as may fall due from said complainant for use of any portion of road or roads or terminal facilities of any other company or companies, and also for all rentals due or to become due upon rolling stock heretofore sold to complainant and partially paid for."

The answer of the receivers to the petition of the trustees avers that the "earnings of said Quincy, Missouri and Pacific
39 railroad were never at any time since said railroad was operated by said Wabash, St. Louis and Pacific Railway Company and said receivers sufficient to pay its operating expenses, fixed charges, and interest on its bonded indebtedness, and that said Quincy, Missouri and Pacific Railroad Company is now justly indebted unto said Wabash, St. Louis and Pacific Railway Company and said receivers for the amounts expended by said company and said receivers in operating said railroad over and above the earnings thereof."

The answer of the receivers to the petition of the Quincy, Missouri and Pacific Railroad Company, after substantially the same averment above quoted from the answer above mentioned, prays "that an accounting may be had in this court as to the excess of expenses over earnings of said Quincy, Missouri and Pacific Railway Company, and that said intervenor be required, under proper orders of this court, to pay to said Wabash, St. Louis and Pacific Railway Company and these receivers the amounts so expended by it and them in operating said line of railway at a loss as aforesaid, and for such other and further relief as prayed for in said cross-bill and as to equity may appertain."

These petitions were submitted upon the answers of the receivers, the receivers' reports, pleadings in the consolidated cause, exhibits, and all other papers on file material to the issues presented.

On the 26th day of June, 1884, the receivers filed a petition stating, among other things (vol. 1, Pet. of Receivers, etc., p. 51 *et seq.*), that the earnings of the Quincy, Missouri and Pacific railroad (see

bottom of page 54) had not at any time since its acquisition been sufficient to pay its operating expenses, cost of maintenance,
40 and interest in the several series of bonds secured by deed of trust thereon, and praying for the advice of the court (p. 57) "as to how they shall dispose of the earnings and keep the accounts of the earnings and of the operating expenses and cost of maintenance of the several other lines or divisions aforesaid and which have not and which your petitioners are informed and believe will not, for the present, be enough to pay their operating expenses, the cost of maintenance, and interest on the several series of bonds secured by mortgage upon them respectively."

On the 28th day of June, 1884, in response to said receivers' petition, the court made an order (1 vol. Petitions, etc., pages 199 *et seq.*) directing them to pay the interest on certain bonds; but in respect of the Quincy, Missouri & Pacific railroad (and all other properties which the receivers had reported were not earning, in excess of operating expenses, sufficient to pay the interest on bonds secured by them) the court ordered (pp. 207, 208) the receivers, until otherwise directed, to keep accounts of all its earnings and operating expenses, cost of maintenance, and taxes, separately, and to make quarterly reports thereof, showing not only its income and expenses but the methods by which its income and operating expenses were ascertained.

This order was certainly notice to the Quincy, Missouri & Pacific Railroad Company and to the trustees, Gilman and Bull, that the interest upon the bonds named in their petitions would not be paid by the receivers unless earned by the property in excess of operating expenses, cost of maintenance, and taxes. No exception to this order was taken by either of the intervenors.

On the 9th day of January, 1885, the receivers filed their quarterly reports, as called for by the order, for the quarter ending September 30th, 1884, showing a deficiency as of that date of
41 earnings of $1,416.78. (Vol. II, Pet., etc., p. 159.) No exception was filed to this report by either of the intervenors.

At the March term, A. D. 1885, of this court the receivers prayed instructions in respect of the future operation of certain lines (including the Quincy, Missouri & Pacific railroad) "and concerning the payment of the respective rentals agreed to be paid by said Wabash, St. Louis & Pacific Railway Company in the several leases and agreements aforesaid." In their petition they recited the fact that during the period from May 29th, 1884, to November 30th, 1884, the expenses of the Quincy, Missouri and Pacific railroad (not including any charge for rental) had exceeded its earnings by the sum of $10,201.93.

On the 16th day of April, 1885, the court, in response to the receivers' petition, made the announcement to be found on pages 357 and following of vol. II, Petitions of Receivers, etc.

It is unnecessary to quote the instructions there given to the receivers. The substance of them clearly was that the receivers were not to pay rental of or the interest of bonds secured upon leased

lines unless such lines earned a surplus over expenses, and then only to the extent of such surplus.

Whether these intervenors excepted to the action of the court last above referred to, it is immaterial at this time to inquire. The instructions then given to the receivers have not, as regards the interest as a rental charge, now under consideration, been rescinded or modified.

The court at the same time distinctly stated that the claims of lessors or subdivisional mortgagees, who desired possession of properties regarding which rental or interest was not paid, would be promptly recognized; and, on the first day of August, 1885, under the order of this court dated July 15th, 1885, the receivers herein surrendered the Quincy, Missouri and Pacific railroad to Gilman and Bull, the trustees.

42 In view, therefore, of the several orders of the court above referred to and of the fact appearing in the petition of the receivers filed at the March term, 1885, of this court that the expenses of the Quincy, Missouri and Pacific railroad (not including any charge for rental) up to November 30th, 1884, had exceeded its earnings by the sum of $10,201.93, and of the further fact appearing from the subsequent reports of the receivers that the expenses of said railroad (not including any charge for rental) and taxes paid by the receivers from May 29th, 1884, up to August 1st, 1885, at which time it was surrendered to said trustees, had exceeded its earnings by the sum of $19,395.83, I respectfully recommend that the petitions of the intervenors be denied.

This disposes of the subject-matter of the petitions. As to the prayer for an accounting contained in the answer of the receivers to the petition of the Quincy, Missouri and Pacific Railroad Company, I make no recommendation at this time other than that this report be without prejudice thereto.

On the 2nd day of May, 1887, the said intervenors lodged with said clerk the following exceptions to said report:

Exceptions to Master's Report.

In the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* WABASH, ST. LOUIS & PACIFIC RAILROAD COMPANY *et al.*, Defendants; Theodore Gilman and Charles H. Bull, Trustees, Intervenors; Quincy, Missouri & Pacific Railroad Company, Intervenor.	In Chancery. No. 2357, No. 2464. (Consolidated.) Master's No., 191. Clerk's No., 851. Master's No., 274. Clerk's No., 1227.

43 Now come Theodore Gilman and Charles H. Bull, trustees, intervenors herein, and The Quincy, Missouri & Pacific Railroad Company, intervenor herein, and file this their exceptions to the report

of the said special master upon the above intervening petitions for the following reasons:

First. For that the said master in his report has erred in his conclusions of law upon the issues presented by the pleadings.

Second. For that the said master recommends that the prayers of the intervenors be denied, whereas the master should have recommended that the prayers of the petitioners be granted and the receivers directed to pay intervenors' rental accrued during the time the Quincy, Missouri & Pacific railway was in the hands of the receivers, amounting to $114,380.00, and also $16,000, being the taxes on said property for the year 1884, and not paid by said receivers, but subsequently paid by intervenors.

HOUGH, OVERALL & JUDSON &
D. H. CHAMBERLAIN,
Att'ys for Intervenors.

On the 16th day of May, 1887, the said special master examined said exceptions to said report and declined to change said report.

On the 19th day of March, 1888, the said court, on hearing of said intervening petitions and exceptions, entered the following order:

44 In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

CENTRAL TRUST COMPANY OF NEW YORK *et al.*
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY.

Decree in Re Petition of Quincy, Missouri and Pacific Railroad Company and Theodore Gilman and Charles H. Bull, Trustees.

MARCH 19TH, 1888.

Now, on this day, this cause coming on to be heard upon the petitions of the Quincy, Missouri & Pacific Railroad Company and of Theodore Gilman and Charles H. Bull, trustees; the answer thereto of Solon Humphreys and Thomas E. Tutt, receivers of the
45 Wabash, St. Louis & Pacific Railway Company; the report of E. T. Allen, Esq., special master, and the exceptions taken to said report on the part of the intervenors; and the said exceptions and said cause having been argued by counsel, and the court, having fully considered the same, doth order, adjudge, and decree that each of said exceptions of said intervenors be disallowed and overruled, and the said report is in all things hereby confirmed.

And it is further ordered, adjudged, and decreed that said petitions be dismissed, and that the costs of this proceeding be taxed against said petitioners.

(Signed) AMOS M. THAYER, *Judge.*

On the 19th day of March, 1888, at the time of entering the last-named order, the judges of said court delivered the following opinions:

46 In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*, Defendants.	Consolidated Cause. Nos. 2357 and 2464. In Equity.

Opinions in Re Intervening Petitions of Theodore Gilman and Charles H. Bull, Trustees; George I. Seney, Trustee, and St. Joseph & St. Louis Railroad Company, March 19, 1888.

BREWER, *C. J.:*

These are three intervening petitions, in each of which is presented the question of liability for rentals during the receivership. The master denied the petitions, exceptions were duly taken, and the question is now before us on these exceptions.

The first two cases are so nearly alike that the statement
47 of the facts in one will bring the question clearly before us.

In August, 1879, the Quincy, Missouri and Pacific Railroad Company leased its road to the Wabash Railroad Company for a period of ninety-nine years. By subsequent consolidations the Wabash Railway Company became merged into the Wabash, St. Louis and Pacific Railway Company. The latter company, of course, succeeded to all the obligations of the former. The conditions of the lease material to this inquiry were substantially that the lessee would pay taxes and keep the road in repair, and also pay as rental a given percentage of the gross earnings, guaranteeing that such percentage should at all times be equal to the interest, at six per cent., on the bonds of the lessor company, issued at the rate of $9,000 per mile. At the beginning of the receivership the outstanding bonds of the lessor amounted to $1,204,000. Gilman and Bull were the trustees in these bonds, and the intervening petition was filed by them as well as by the Quincy Railway Company.

On the 29th of May, 1884, the Wabash, St. Louis and Pacific Railway Company filed its bill in this court confessing its insolvency and praying the appointment of receivers. This bill showed that the complainant's property was a system made up by the consolidation of various independent lines, some of which were taken in by lease and some by purchase; that nearly all of these independent lines were subject to underlying and prior separate mortgages. It also showed the two general mortgages—one on the system as consolidated, and the other on terminal facilities and certain other properties. It averred that the value of these properties consisted largely in the preservation of the system intact, and that to permit the breaking up of the system by separate foreclosures of these underlying mortgages would largely impair the value of the properties. It made the lessor companies party defendant. It prayed, among other things—

48 "That after paying such claims as were required to be paid in order to prevent a forfeiture of orator's rights and in-

terests in all rolling stock and equipments the residue or surplus of all incomes, revenues, and earnings of said railroads and all other assets coming into their hands as such receivers be applied to the discharge of all debts, obligations, and liabilities of orator according to the rights and legal and equitable priorities of all concerned, as creditors or otherwise, under the direction of the court."

The order appointing the receivers directed them to take possession of all these lines of road merged in this one system, and also as follows:

"It is further ordered that the said receivers, out of the income that shall come into their hands from the operation of said railroad or otherwise, proceed to pay all balances due or to become due to other railroads or transportation companies on balances growing out of the exchange of traffic accruing during six month prior hereto.

That said receivers also in like manner pay all rentals, accrued or which may hereafter accrue, upon all leased lines of said complainant and for the use of all terminals or track facilities and all such rentals or installments as may fall due from said complainant for the use of any portion of road or roads or terminal facilities of any other company or companies, and also for all rentals, due or to become due, upon rolling stock heretofore sold to complainant and partially paid for.

That said receivers also pay in like manner, out of any incomes or other available revenues which may come into their hands, all just claims and accounts for labor, supplies, professional services, salaries of officers and employés that had been earned or have matured within six months before the making of this order.

It is further ordered that said receivers pay all current expenses in the operation of said road, collect all the revenues thereof,
49 and all choses in action, accounts, and credits due and to become due to the company.

That such receivers keep such accounts as may be necessary to show the source from which all such income shall be derived, with reference to the interest of all parties herein, and the expenditures by them made."

In pursuance of this order the receivers took possession of the Quincy road with the other properties. On the 26th of June, 1884, the receivers filed their petition in the court asking its instructions as to how they should dispose of the earnings of certain lines, among them the Quincy road, which lines they believed did not earn enough to pay operating expenses and rental, and on the 28th of June an order was enterd as follows:

"3d. It is further ordered that the receivers herein, until otherwise directed, keep the accounts of all the earnings and incomes from as well as the accounts of all the operating expenses, costs of maintenance, and taxes upon the following lines or divisions of said property separately, to wit:"

On the 15th of October, 1884, upon the report of the master, recommending that the receivers be directed to pay interest on a cer-

tain division, the court, in granting the order, made this announcement:

"The COURT: I stated at an early day, and Judge Brewer has gone over that matter (and we are in accord with regard to it), that I am not going to take the money that belongs to the underlying mortgages to pay interest on non-earning branches. If they have got to fail they must fail. I will protect the underlying mortgages especially, and they haven't got enough here to do it.

Mr. SMITH: Then I ask that the matter be referred to the master, and we will introduce testimony showing the actual earnings of the road in the past three months.

50 The COURT: That is the important element. If this branch is earning enough to pay its own interest, that is another inquiry; but certainly I am not going to sit here and order that the earnings that belong to other branches in this consolidated system shall be taken to pay concerns that do not pay earning expenses. Let them collapse."

And on April 16th, 1885, after receiving the reports of the receivers in respect to several lines, the Quincy road among them, and after notice to the various parties in interest, an order was entered to this effect:

"1st. That the subdivisional accounts must be kept separately. 'That was an order,' said the court, 'passed by Brother Treat at the very outset of this receivership, in order that the particular equities of each one of these divisions as between themselves might be ascertained.'

"2d. Where any subdivision earns a surplus over expenses, the rental or subdivisional interest will be paid to the extent of the surplus, and only to the extent of the surplus.

"3d. Where a subdivision earns no surplus, simply pays operating expenses, no rent or subdivisional interest will be paid. If the lessor or the subdivisional mortgagee desires possession or foreclosure he may proceed at once to assert his rights, while the court will continue to operate such subdivision until some application be made, yet the right of a lessor or mortgagee whose rent or interest is unpaid to insist upon possession or foreclosure will be promptly recognized.

"4th. Where a subdivision not only earns no surplus, but fails to pay operating expenses, as in the St. Joseph and St. Louis branch, the operation of the subdivision will be continued, but the extent of the operation will be reduced with an unsparing though a discriminating hand."

And on July 15th, 1885, the court, on the application of
51 the trustees, Gilman & Bull, made an order directing the receivers to surrender the Quincy road to them, which was done. As a matter of fact, the earnings of the Quincy road during time it was in the hands of the receivers were insufficient to pay the operating expenses, and at the time the receivers took possession of the property there was due by the company of floating debts, which, by the rulings of the Supreme Court, were preferential debts

and entitled to payment prior to the mortgages, over three millions of dollars. The gross receipts of the entire system during the receivership were insufficient to pay the operating expenses and discharge all of this floating and preferential indebtedness, and the purchasers, in addition to the sum bid by them, have, as required by the orders of this court, paid the balance of said preferential and floating indebtedness. The purchasers have taken possession of the property within the jurisdiction of this court, though it is true the court in the order surrendering possession reserved the right to retake it if the purchasers failed to pay all claims and demands which should be adjudged prior in lien to the mortgages. The intervenors' claim, of course, is that the rentals due them are preferential debts and should be paid prior to the mortgages. I believe these facts present the question fully.

We start with this fact, that prior to the appointment of the receivers intervenors' claim was subordinate to that of the mortgagees. It was a claim, of course, good against the income, but not against the corpus—at least not good against the corpus until after the payment of the mortgages—and the first question is whether the action of the receivers in taking possession or of the court in ordering possession changed the status and gives to intervenors' claim a higher position than it theretofore had. It is strenuously insisted by intervenors that it did, and they say that by taking possession of this leased property the receivers became virtually
52 the assignees of the lease, and therefore bound by its terms, and bound to an extent which binds the property in preference to the lien of the mortgagees. A multitude of citations are made from the text books and decided cases to the effect that where a mortgagee institutes foreclosure proceedings, and upon his application a receiver is appointed, and such receiver takes possession of property leased by the mortgagor, such taking of possession is an acceptance of the lease and binds the receiver as assignee, and binds so as to concede a preference to the lessor in respect to his rental. In other words, if A, a mortgagee, commences foreclosure proceedings against B, a mortgagor, and a receiver, appointed at his instance, takes possession of the property of C, leased by B, such possession of the leased property is an acceptance by the receiver of the lease, makes him an assignee of the lessee, and binds both him and A, the mortgagee, to the full amount of the mortgaged property to the payment of the rents.

High thus states the rule:

"As a rule, receivers are not liable upon the covenants of the persons over whose effects they are appointed, but become liable solely by reason of their own acts; and receivers who have been appointed over a corporation and who have accepted the trust and taken possession of the assets do not thereby become liable for rent of the premises held by the company under a lease.

"Nor can they be held liable until they elect to take possession of the premises or until the doing of some act which would in law be equivalent to such an election; but when a receiver enters upon and occupies premises which had been leased to a corporation over

which he is appointed, he thereby becomes liable for the rent due under the lease, the liability in such cases being the common-law liability of an assignee of a lease and not for the debt due
53 from the corporation, and in such case, the facts being undisputed, it is proper for the court to direct the receiver to make payment to the lessor without a reference to determine the *the* matter."

High on Receivers (2d ed.), sec. 273.

This proposition, fortified as it is by ample citations, is conceded; but is it applicable? This receivership was upon the application of the mortgagor, a party in possession of various properties—some owned, some leased, and all subject to various obligations. Could the action of the mortgagor or the decision of the court upon his application change the relative rights of the mortgagee and the lessor? Was it in the power of the court, upon the application of the mortgagor alone, to charge the mortgagee with obligations to which he never assented?

That this bill was filed by the mortgagor is, of course, conceded, and that its theory was not the preservation of any single creditor's rights, but that of all its creditors, secured and unsecured, is evident from these extracts from the bill:

"That all or nearly all of said mortgages embraced all rolling stock to be thereafter acquired by the companies executing such mortgages, but that, as such original companies and those lines of railroad have been gradually absorbed in orator's vast system, the rolling stock on said entire system has become so intermingled as to be incapable of division according to the original ownership of the said several lines of road according to said several mortgages, and any attempt to control or dispose of portions of such rolling stock by any court or courts not having jurisdiction of the whole and not competent to deal with orator's entire property as a unit would produce great confusion and uncertainty, and would result *to* great loss to all persons interested in said rolling stock or in orator's property or securities; * * * and orator avers
54 that the interest of the orator in said road and of all its creditors and holders of the bonds aforesaid are greatly imperiled by the existing prospect of the disruption of said road on the happening of the default impending as aforesaid, and the interests of all parties can only be protected by the interposition of a court of chancery; that if said lines of railroad are broken up as aforesaid, and the fragments thereof placed in the hands of various receivers, and the rolling stock, materials, and supplies seized and scattered abroad in the manner above indicated, the result will produce irreparable injury and damage, not merely to orator, but to all persons having any interest in said lines of road and the securities thereof."

The idea which underlies this bill is that which underlies the action of a voluntary bankrupt under the bankrupt law. Finding himself insolvent he surrenders his property to the court to be disposed of for the benefit of his various creditors. Such action in no manner changes the relative rights of his various creditors. They

stand subsequent to this action as they did before, and their various right- and equities are determined not by his action in surrendering his property to the custody of the court, but by the terms and obligations of the contracts theretofore entered into. Narrow the question in this way: Suppose A is the owner of a mill and the lessee of an adjacent farm. Having mortgaged both his mill and his leasehold interest and finding himself insolvent, he applies to the court by bill for the appointment of a receiver to take possession of his property and dispose of it for the benefit of his creditors, can it be that his action in filing the bill or the action of the court in appointing a receiver makes the claim for rental an unsecured obligation paramount to the secured lien of the mortgage? The proposition will be startling if true. It would put it in the power of a mortgagor to dispossess the vested lien of the mortgagee
55 and render such lien subordinate to unsecured claims. It is true that after the appointment of a receiver the mortgagee came in with an application for a foreclosure; but the assertion of his rights to a foreclosure was not different from that of the assertion of the lessor to his claim for rent. Each took what rights were given him by his prior contract, and neither by his action waived any of his rights or consented to a subordination of his priority. It is true also that the holder of the general mortgage prayed the court to extend the receivership over a part of the property to it as a mortgagee. Perhaps if that application had been granted some different question might now arise; but the court expressly decided against the application, leaving the receivership to stand as it was in the first instance—one granted on the application of the mortgagor and one whose appointment it was believed would in no manner change the relative rights of any creditor. It may be said that the theory of the bill was novel; that seldom it is that the mortgagor, the debtor, applies for a receivership. This may be true, though this is not the first instance in the judicial history of this country that such an application has been made and sustained. The New York and New England road was upon a like application placed by the circuit court of Connecticut in the hands of a receiver, and in bankrupt cases, though that was specially authorized by statute, such a proceeding was common. But the question is not now upon the propriety of the action of the court in appointing a receiver on the application of the mortgagor, but upon the effect of such action. The propriety of this proceeding was long since challenged in this court, and its opinion, with the concurrence of both judges, was in favor of its propriety and validity. That question being settled, it would seem to be logical and necessary that no action of the court at the instance of the mortgagor, no action of the receivers in direct obedience to the orders of the court, could change the relative rights of the creditors *inter sese*.

56 Again, if the action of the court in making the appointment and of the receivers in taking possession did not of itself create a new and legal obligation against the mortgagees, are there any equitable reasons why the claim of the lessor should be given priority to that of the mortgagee? The lessor was defendant as well

as the mortgagee; each knew his rights; each, summoned into court, was at liberty to assert his rights. Neither was told directly or by implication that he would gain aught by the action of the court in making the appointment. As the mortgagee might come in and did come in asking foreclosure of his mortgage, so the lessor might come in, and many did, demanding the surrender of the leased property for non-payment of rent. These very intervenors, after the lapse of some months, came in and asked possession of their property, which was promptly surrendered. Why should the mortgagee be compelled to pay the lessor any more than the lessor be compelled to pay the mortgagee? Each was summoned into court, each was called upon to make a showing of its claim, and each did so in time and manner that suited it. Because there were various properties, covered by separate mortgages, all merged in one system and as such covered by one subordinate mortgage, is there any equitable reason why the court seizing upon all of the properties at the instance of the common debtor can be said to have created any new and different equities between these various creditors? Did not each stand upon his legal rights—rights as they existed before the receivership and rights which could be asserted at any time, and were, in fact, asserted as soon as each party saw fit? There was certainly nothing in the action of the court or the various orders made by it which gave to any party the right to expect other than his legal claims. Of course the order in the first instance was to pay rentals out of the income, and that income, as we have seen, is all exhausted in preferential debts and operating expenses. Early in the
57 history of receivership the order of the court was to keep separate accounts of the earnings of the different lines, and the clear intimation of all the orders and opinions, as well as the express language of many, was that the income from any property part of the general system would be appropriated to the specific claims upon that property. It is undoubtedly true in railroad foreclosures that, by the decisions of the Supreme Court, certain claims have been adjudged preferential and superior to mortgage and secured liens. So far as these rulings have been made this court has unhesitatingly followed them; but it cannot be that the security of a mortgage deed, even if it be a railroad mortgage, is open to displacement by every unsecured creditor. Only the cogent public reasons which have been so carefully considered and well stated by the Supreme Court justify any postponement of the priority of a mortgage debt. So far as I am individually concerned I am unwilling to go a step beyond the matters and rules laid down by the Supreme Court. As to all outside of those matters, I believe the sacredness of mortgage obligations should be observed and that secured debts should be given the priority which the contracting parties awarded to them. In that view the claims of the intervenors in respect to the Quincy road and the St. Joseph and St. Louis road are without foundation, and the exceptions to the master's reports will be overruled.

With respect to the claim of George I. Seney, the trustee in the

mortgage upon the Clarinda branch, a somewhat different state of facts existed.

On June 28th, 1884, upon the petition of the receivers and the representations by them that the Clarinda branch was important to the system and had earned more than operating expenses, the master recommended an order, which was duly entered by the court, as follows:

"It is ordered that, until otherwise directed, the receivers herein, from the incoming rents and profits of said property,
58 after meeting such other obligations as they have been directed to discharge by the former orders of this court, pay, as the same shall from time to time mature, from whatever balance may remain in their hands * * * on the first days of February and August (or as soon thereafter as practicable), the semi-annual interest, at six per cent. per annum, then due on two hundred and sixty-four (264) bonds of one thousand dollars each, issued in July, 1879, and secured by mortgage on the Clarinda and St. Louis railroad (otherwise known as the Clarinda branch), amounting to $7,920."

The intervenor, though made a party defendant, entered his appearance and first became a party to the proceeding on Jan. 4, 1885. He was notified by the receivers of an application for a new order in respect to the Clarinda branch which was entered upon April 16th. The rental was in fact paid to August 1, 1884. Now, the rental from August 1, 1884, to April 16, 1885, stands, we think, upon a different footing. There was an express order of the court in reference to that branch and couched in such language that the intervenor had a right to rely upon it and expect the payment of his rent until some other order was made. Wherever a specific order is entered after showing and petition by the receivers it would seem as though the party stood upon a different footing and was not called upon to assert his rights as lessor to the surrender of the leased property. Whatever might have been the reasons and however much mistaken the receivers may have been they acted upon their best judgment, and the court seems by that order to have given express assurance to the intervenor that the interest of the system required the payment of that rental and the preservation of that property in the system, so that the order will be that the exceptions to the report of the master will be partially sustained and the receivers directed to pay the rental for the time specified, with
59 interest. So far as the subsequent rental is concerned, there is nothing to distinguish this case from the other two heretofore considered, and the report of the master will be sustained. It is unnecessary to add more. We have had these matters under consideration for some months and have given to them the most careful consideration. The arguments and briefs of counsel have been most full and elaborate and the questions presented not easy of solution. The amounts in each case are so large that if our conclusion is erroneous a review may be had by the Supreme Court.

THAYER, *D. J.*:

I shall only add a few words to what has already been said. We are asked by the intervenors to make an order in this matter the practical effect of which will be to give an unsecured claim priority over a mortgage debt. As there are no funds at our disposal derived from the income of the property lately in the hands of the receiver, if we allow the claims in the desired form we must enforce payment out of the mortgaged property by retaking it unless the purchasers under the mortgage see fit to discharge the lien which we impose.

It is proper, therefore, that we should consider carefully both the legal and equitable grounds upon which such action can be predicated and justified.

No lawyer would for a moment doubt that an assignee in bankruptcy would be liable for rent if he took possession of leasehold premises held by the bankrupt and used them for the purpose of administering on the assets in his hands.

In that event the assignee would become personally bound
60 by the covenants of the lease so long as he remained in possession, and the court would be bound to protect him against the covenant to pay rent by allowing him for all rent, disbursements as an expense of administration (*In re* Merrifield, Third National Bankruptcy Register, p. 98, and People *vs.* Insurance Company, 30 Hun., 142).

The same principle holds good, of course, in its application to public liquidators under the English winding-up acts and receivers of copartnership estates and the like.

In re Oaks, Pitts, Colliery Company (L. R., vol. 21, Chancery Division, 330; *In re* Lundy Granite Company, sixth Chancery App., 462, and Commonwealth *vs.* Insurance Company, 115 Mass., 278): If such officers use property held under lease for the purpose of advantageously administering on property committed to their charge they must pay rent as stipulated in the lease, and the amount paid is an expense of administration, is chargeable against the fund undergoing administration.

The rule as applied in such cases has never operated, however, so far as we can find, to disturb the priority or claims—that is to say, so as to give an unsecured debt a preference over one that is secured.

It is also well settled that if mortgagees, in a proceeding to foreclose a mortgage, procure the appointment of receivers and cause them to take possession of property held under lease by the mortgagor, to which their mortgage does not extend, they thereby bind the mortgaged property for the payment of rent that accrues so long as the receiver remains in possession.

Such was the rule applied in the case of Woodruff *vs.* The Erie Railroad Company (93 N. Y., 609); Miltenberger *vs.* Railroad Company (106 U. S., 286).

The principle which underlies all of the cases cited appears

to be substantially the same—that is to say, if an as-
61 signee in bankruptcy, public liquidators, receivers of insolvent corporations, or receivers appointed under proceedings to foreclose mortgages take possession of the property of a third party, held under a lease, and use it ostensibly for the purpose of administering advantageously on the assets in their hands or at the instance of and for the benefit of mortgagees, full rent must be paid for the use of such property out of any funds within the control of the court, and that without reference to the question whether the use of the leased premises proves to be beneficial or otherwise.

There is, in fact, no difficulty in deciding what the law is. The difficulty lies in making a correct application of it to the particular case under consideration, or, rather, it lies in determining whether the present proceeding was of such an exceptional character that the principle invoked to establish the liability in question is applicable.

Attention has already been called to the fact that the bill in this case was filed by the mortgagor against all persons and corporations, including the lessors, who were interested in the various roads forming the complainant's railroad system.

As I understand the bill of complaint, the complainant professed to be acting, not alone in the interest of mortgagees, but in the interest of all the corporations whose roads had become an integral part of the system, whether by lease, consolidation, or otherwise.

It was substantially represented by the bill that the affairs of the complainant had become so complicated by the various mortgages that had been executed, the consolidations that had taken place, and the leases made or assumed and by the admixture of rolling stock that the best interests of all parties concerned demanded
62 the appointment of receivers over the whole system as the only feasible method of working out the equities appertaining to each.

It was on account of such representations that the receivers were appointed and ordered to take possession of the whole system. In other words, the receivership was not created for the benefit or protection of any one interest or class of interests, but for the benefit of all parties to the suit who were in anywise interested in the system. The lessor companies, whose roads went into possession of the receiver, were advised of such facts by the form of the bill and by the prayer for relief. They were at liberty, at any time after it was filed, to show that the extension of the receivership over the leased lines was not necessary to the protection of any interests of the lessor companies or that it was detrimental to such interests. If such showing had been made (and it appears to me that the lessor companies were cited into court to confess or deny the averments of the bill in that behalf), the leased lines would unquestionably have been released at any stage of the proceeding.

Intimations to that effect and of the theory on which the court was proceeding appear to have been given during the progress of the case from time to time; but so long as the lessor companies acquiesced in the averments contained in the bill and on the faith of

which receivers were appointed it appears to me that the receivership continued to stand for their protection and for the protection of the interests of all persons and corporations who were parties to the proceeding, and that so long as that state of affairs existed the relative rights of the parties were not changed, and that the mere possession by the receiver of the leased lines did not have the effect of making the rentals a charge on the body of the mortgaged property superior in rank to the mortgage debt. The case, as I conceive, bears some analogy to the case of the Bridge Water Engineer-
63 ing Co. (12th Chancery Division, 181), where, inasmuch as a public liquidator had retained possession of rented premises for the mixed accommodation or benefit of the landlord and the liquidator, the chancellor refused to allow the rents as a part of the cost of administration.

The question before us should not be determined, in my opinion, with any reference to the question whether it was in fact necessary for the protection of the interests of the lessor companies to extend the receivership over the leased lines, although if we were at liberty to consider that matter it seems probable, in view of the condition of one of the leased roads, that if it had not been taken in hand by the receivers it would have suspended operations for a time at least and put the public to great loss and inconvenience, even if it had not incurred a forfeiture of its franchises.

But, be this as it may, the question is not to be determined by considering whether the representations of the bill were erroneous in so far as the leased lines were concerned. We must consider what the bill did in fact allege, upon what theory it was drawn, and for what purpose the court appointed receivers and for whose benefit, and whether in the light of such facts and the subsequent acquiescence of the lessor companies they can now legally or equitably insist that because the receivers took possession of their road under an order of court the rentals which accrued during the period of such possession must perforce take precedence over the mortgage debts, although such leased lines during the period in question did not pay operating expenses.

In my opinion, this question must be answered in the negative. The case is so exceptional in its character that the principle invoked to establish the liability in question, in my judgment, is not applicable.

In the course of the argument something was said about
64 the receivers having exercised an election to take possession of the leased lines. On the one hand, it was argued that as they elected to take possession they became personally bound as assignees of the lease by all its covenants. On the other hand, it was urged that they acted under the orders of the court and exercised no election or discretion.

It appears to me that the receivers did not elect to take the leased lines in the sense in which that term is used in the books, but at the same time I do not regard the question as to whether their action was voluntary or enforced as at all material. They had possession of the leased lines and operated them. If the court ordered

them to take possession of the same for the benefit of any particular interest or class of interests involved and without any reference to the protection of the rights of the lessor companies themselves, then those interests for whose advantage the leased lines were taken and operated by the receivers should stand the expense of the rental, and the court would be bound to so order. The court has no more right than an individual to use one person's property for the exclusive benefit of another without paying for its use.

But from the record and proceedings in this case it does not appear to me that any property was so taken and used. The entire system was taken in hand at the instance of the general owner to protect the interests of all parties concerned. The court, through its receivers, at all times adopted that line of policy, which seemed to be conducive to the best interests of all parties as then foreseen. Among other things done for the protection of all parties to the litigation at any early day it made an order to prevent the earnings of the numerous reads composing the system from becoming confused. It appears to me that such order, so far as it related to the leased lines, was a most explicit avowal that the court did not regard
65 the rentals that from time to time accrued as an expense of administration, and that it did not regard the receivership as having been created for the benefit of the mortgagees or any particular class of creditors, but for the mutual advantage of all parties concerned, the lessor companies included.

In conclusion I will add that in any light in which I have been able to view the question it appears to me that the report of the master should be confirmed in the respects indicated in the main decision, and I accordingly concur in the order already announced.

66 On the 22nd day of March, A. D. 1888, there was entered by said court the following order:

CENTRAL TRUST CO. OF N. Y. *et al.*, Complainants, *vs.* WABASH, ST. LOUIS & PACIFIC R'Y CO. *et al.*, Defendants.	2357 & 2464.	Consolidated.

In re intervening petitions of the Quincy, Missouri & Pacific Railroad Company and Theodore Gilman and Charles H. Bull, trustees.

Appeal Allowed.

Now come the Quincy, Missouri & Pacific Railroad Company and Theodore Gilman and Charles H. Bull, trustees, by their solicitors, on whose motion it is ordered that an appeal from the decree of this court to the Supreme Court of the United States be allowed upon said intervenors giving an appeal bond in the penal sum of two hundred and fifty ($250) dollars, to be approved by the court or one of the judges thereof.

On the 20th day of June, A. D. 1888, there was entered by said court the following order:

CENTRAL TRUST CO. OF N. Y. *et al.*, Complainants, *vs.* WABASH, ST. LOUIS & PACIFIC R'Y Co. *et al.*, Defendants.	2357 & 2464. Consolidated.

In re intervening petitions of the Quincy, Missouri & Pacific Railroad Co. *et al.*

Appeal Bond Approved.

Now come the Quincy, Missouri & Pacific Railroad Company and Theodore Gilman and Charles H. Bull, trustees, by their solicitors, and present their appeal bond in the sum of two hundred & fifty dollars, which is approved by the court and ordered to be filed as part of the record herein.

And thereupon it is ordered that the clerk of this court make out and certify to the Supreme Court of the United States a transcript of the record and proceedings in this cause.

67 On May 27th, 1884, said respondent company, The Wabash St. Louis and Pacific Railway Company, filed in said court its bill of complaint against said Central Trust Company of New York and others, respondents, and is in the words and figures following, to wit:

In the Circuit Court of the United States for the Eastern District of Missouri, of the March Term, A. D. 1884.

To the honorable the judges of the circuit court aforesaid, in chancery sitting:

Humbly complaining to your honors, your orator, The Wabash, St. Louis & Pacific Railway Company, would respectfully represent that your orator is a body politic and corporate organized and existing under and by virtue of the laws of the State of Missouri and is a citizen and resident of said State.

That your orator owns a number of lines of railroads extending across the States of Missouri, Illinois, and Indiana, and also into the States of Ohio, Michigan, and Iowa, with branches extending in various directions within said States.

That orator was created a body corporate by the consolidation of certain other corporations organized and existing under the laws of the States of Missouri, Illinois, Indiana, and Ohio and owning and operating lines of railroad in said States.

That portions of the said lines so owned by your orator lie within the eastern district of Missouri, and your orator's principal office and the headquarters of its management are located in the city of St. Louis, in said district.

Further complaining, your orator further shows unto your honors

that your orator is also the lessee of certain other lines of rail-
68 roads located within the said several States, and your orator has operated all of said lines as a unit until recently, when said lines were leased by the orator to the St. Louis, Iron Mountain & Southern Railway Company, a corporation existing under and by virtue of the laws of the State of Missouri, and that said last-named company now operates all of said lines of railroad as the lessee of orator.

That by the terms of said lease said St. Louis, Iron Mountain & Southern Railway Company was required to pay as rental of said lines all the net earnings thereof to orator or on account of orator, but was not bound to pay or advance to or on account of orator any sum or sums in excess of such net earnings, all of which will more fully appear by reference to such contract of lease, made on exhibit, as hereinafter set forth.

Your orator further shows that several lines of railroad owned by orator, as distinguished from its leased lines, were acquired in part by consolidation and in part by purchase, and that while said lines were owned by other corporations prior to the acquisition of title thereto by orator each of said lines was incumbered by one or more mortgages or deeds of trust issued and executed by the companies owning the said lines prior to orator and intended to secure the payment of the bonded indebtedness of such companies, and that large numbers and amounts of such bonds so secured by liens on said portions of orator's lines are now outstanding and unpaid; and because said mortgages or deeds of trust are very numerous your orator files as part of this bill of complaint a list thereof, showing the dates of said several instruments, the trustees named therein, the amounts secured thereby, the rates of interest and times when interest and principal mature upon the same, the several companies by which said mortgages and bonds were issued, and the lines cov-
ered by each of said mortgages or deeds of trust, and also the
69 amounts now unpaid thereon severally; and orators marks said list Exhibit A, and prays that the same be taken as a part thereof.

And orator also embraces in said Exhibit A a statement of interest obligations assumed by orator and secured by mortgages or deeds of trust on its leased lines, the payment of such interest being conditions on which orator obtained such lines; and orator also files as parts of said Exhibit A copies of all such mortgages, deeds of trust, and leases as are necessary to the purpose of this bill (and which are not herein made distinct exhibits by themselves) so far as such copies are obtainable in time to be filed herewith, the orignal and record copies of some of said instruments not being within reach of orator within the time left to orator under the circumstances which require the prompt filing of the bill of complaint; but orator will, as soon as possible, file copies of all such instruments so far as necessary, and prays that when filed the same be taken as parts hereof; and orator marks all such copies of instruments as are filed herewith and are not made distinct exhibits by themselves

Sub-Exhibits A and numbers the same consecutively for easy identification.

And orator further shows that after your orator had acquired title to the greater portion of the lines of railroad aforesaid, to wit, on the first day of June, 1880, your orator executed to the Central Trust Company of New York, a corporation existing under the laws of the State of New York, and which then was and *is* still is a citizen and resident of said last-named State, and to James Cheney, who then was and still is a citizen and resident of the State of Indiana, as trustees, a certain mortgage or deed of trust, to which orator prays leave to refer as the "general mortgage." The said general mortgage was intended to secure an issue by orator for the purposes therein expressed of bonds to the amount of fifty million dol-
70 lars, payable in gold coin on the first day of June, A. D. 1920, with interest at the rate of six per cent. per annum, payable on the first days of June and December of each year; and orator files herewith a true copy of said general mortgage, marked Exhibit B, and prays that the same, together with the certificates attached thereto and the copy of bonds embraced therein, be taken as part of this bill as fully as if incorporated in the body thereof.

Further complaining, your orator also showeth that said general mortgage embraced all the lines of railroad then owned by orator, and also all its interest in all other lines and property then owned or thereafter to be acquired, and also all rents, issues, and profits derived by orator from said lines of road, and all leasehold interests then owned or thereafter to be acquired by orator.

And said mortgage further embraced all credits and choses in action accruing to orator and all the franchises of orator; but said mortgage or deed of trust so placed upon said property was, by the terms thereof, expressly made subject and inferior to all such prior liens as were charged upon the several portions of said road and the equipments thereof and to the estate and lien of such specific trust and mortgages and other obligations as might thereafter be made and charged upon any property which might thereafter be acquired by orator, and which trust, so charged, should form part of the purchase-money or conditions of the acquisition of such after-acquired property by your orator.

Your orator shows that under the terms of said mortgage bonds were issued, negotiated, and sold for value by orator to the amounts stated in said Exhibit A, and that interest is accruing and will fall due thereon, as shown by said exhibit.

Your orator further states that said general mortgage was duly executed, acknowledged, and recorded as required by
71 law, and that the bonds so issued as aforesaid were duly certified by the trustees named in said mortgage according to the terms and conditions thereof.

Further complaining, your orator showeth that on the 10th day of April, A. D. 1883, your orator executed and delivered to the St. Louis, Iron Mountain & Southern Railway Company aforesaid an indenture of lease whereby orator leased to said last-mentioned company all its lines of railroad, whether owned or leased by orator,

upon the terms and conditions set forth in the said indenture, and said lessee company has since the execution of said instrument operated said several lines of railroad and still continues so to do as the lessee of your orator; and orator files herewith a true copy of said indenture of lease, marked Exhibit C, and prays that the same be taken as a part of this bill of complaint as fully as if incorporated into the body of it, and your orator refers to the copy so filed as Exhibit C as showing the terms and conditions upon which the lines of railroad of orator were so leased to said St. Louis, Iron Mountain & Southern Railway Company.

And orator, further complaining, also showeth to your honors that, being greatly in need of money wherewith to meet accruing interest and to place its lines of road in good condition and to obtain and pay for a large amount of rolling stock and other necessary equipment and to complete certain of said lines then being constructed, orator, on the 1st day of May, 1883, entered into a certain other indenture with the Mercantile Trust Company of New York, a corporation organized and existing under the laws of the State of New York and a citizen and resident of said last-named State; that orator was named in said indenture as the party of the first part, and the said Mercantile Trust Company of New York as party of the second part, and said St. Louis, Iron Mountain & Southern Railway Company was named therein as party of
72 the third part; and orator files herewith a true copy of said last-named indenture, marked Exhibit D, and prays that the same be taken as a part of this bill of complaint; that by the terms of said indenture orator assigned and conveyed to said Mercantile Trust Company, in trust for the purposes therein mentioned, a large number of engines and cars, and also a large number of bonds, stocks, and certificates, and also certain equitable interests of orator in certain valuable depots, grounds, and terminal facilities in the city of Chicago, Illinois, held in trust for orator by Solon Humphreys and John P. Garrett, and also certain like interests and facilities in the city of Detroit, Indiana, Peoria, Illinois, and Des Moines, Iowa.

That said last-mentioned indenture was so executed for the purpose of securing a number of bonds to be issued by orator, amounting to ten millions of dollars, payable in twenty years from date, with interest at the rate of six per cent. per annum, payable semi-annually on the 1st days of May and November of each year.

And orator further showeth that bonds secured by said indenture were issued and sold or pledged for value by orator to the amount shown by said Exhibit A, and that the amount thereof so outstanding and the interest accrued and accruing thereon are also shown by said exhibit; and orator begs leave to refer to the said indenture so marked Exhibit D as the "collateral trust."

And orator would further show that afterwards, to wit, on the 21st day of December, 1883, orator, as party of the first part, entered into a certain other indenture, bearing said date, in which said indenture the said St. Louis, Iron Mountain & Southern Railway Company was party of the second part, by which instrument orator, for the

purposes therein expressed, mortgaged to said last-named company all its lines of railway and all its property, choses in action, income, rents, and profits; and orator files herewith copy of said last-
73 mentioned indenture, marked Exhibit "E," and prays that the same may be taken as a part of this bill of complaint; and orator further shows that said last-mentioned mortgage was duly recorded, but was and is subject to certain prior mortgages herein referred to.

That said last-mentioned mortgage was intended to secure said St. Louis, Iron Mountain & Southern Railway Company as to any advances made or to be made to orator under the provisions of said indenture of lease.

Further complaining, your orator shows unto your honors that for several successive years your orator has been compelled to spend vast sums of money in repairing injuries inflicted upon the lines of your orator by repeated and extreme freshets; that during the last two years the said freshets and high waters have been so extreme that in many places your orator's tracks, embankments, bridges, and culverts were wholly swept away for long distances, and that in one instance the bridge of your orator, known as the St. Charles bridge, was so far injured and so nearly destroyed that your orator was compelled to expend several hundreds of thousands of dollars in replacing the same.

That during the last two years a partial failure of crops has occurred in large sections of the country occupied by orator's lines, and particularly in those fertile portions of said country from which orator fairly and reasonably expected to derive very large revenues during said time; but that during said two years orator's revenues, from the causes aforesaid, have been greatly diminished, and at the same time orator's expenses have been largely increased by the unusual recurrence of the extreme freshets, as herein already stated.

That in order to meet the expenses of maintenance and operation of its road and to repair the ravages occasioned by said freshets and to complete portions of its said lines in course of construction
74 and to put the same in operation your orator has been compelled to borrow large sums of money, the amounts of which will be hereafter stated.

That a considerable portion of said money was advanced by the St. Louis, Iron Mountain & Southern Railway Company to orator, but that under the terms of the lease aforesaid made between orator and said last-mentioned company the said St. Louis, Iron Mountain & Southern Railway Company is not required to make further advances, and nas notified orator that it does not intend to advance any more money to orator.

That your orator also issued within the last two years its promissory notes for very large sums of money, and in order to provide means for the meeting of its expenses and the keeping of its road in successful operation and completing its lines as aforesaid orator induced a number of persons of high financial standing to become indorsers of said notes, and by means of a credit given by such indorsements orator was enabled to negotiate said notes for value and

receive the proceeds thereof; and orator shows unto your honors that there will be due on said promissory notes at maturity about the sum of two millions two hundred thousand dollars.

Orator further shows unto your honors that the several persons aforesaid by whom orator's notes were endorsed as aforesaid are partially secured with respect thereto by a pledge of bonds secured by said collateral trust to the nominal amount set forth in Exhibit A aforesaid, and to that extent said persons have a lien upon all the property embraced in said collateral trust, including the bonds, stocks, rolling stock, engines, and real estate specified in said collateral trust.

And orator further showeth unto your honors that orator is now indebted to said St. Louis, Iron Mountain & Southern Railway Company for money advanced over and above the net earnings
75 of orator's lines leased as aforesaid on about the sum of $1,150,091.30 of principal, with interest accruing thereon, and that said sum of principal and interest thereof is secured by bonds issued as aforesaid and secured by said collateral trust.

Your orator further showeth that by reason of the failure of the crops aforesaid, and the enormous expenses imposed upon orator by the recurrence of extreme freshets as aforesaid, and by reason of the cost of completing its lines as aforesaid, a large floating debt has accumulated against your orator, amounting in the aggregate to about the sum of 4,784,145.01 dollars.

That a portion of said indebtedness is represented by small judgments, and the greater portion is distributed among a vast number of persons, all or nearly all of whom are pressing orator for payment, and threatening and, as orator alleges upon information and belief, intending to resort to every legal method of enforcing the collection of the said claims.

The orator is largely indebted to a number of other railroad companies on balances arising from an exchange business. The exact amount of said indebtedness is not known to orator, as the total thereof is continually changing; but orator avers that payment of said balances within a reasonable time is necessary to the preservation of the business of orator in exchange with such other companies, and if the amount of such exchange balances due from orator shall not be promptly paid, many of said companies connecting and exchanging business with your orator will withdraw their business and exchange of traffic, and thus greatly reduce the income and impair the earnings of orator; that such balances were received by orator in trust for the several companies entitled to the same.

Your orator would further show that by the terms of nearly all, if not quite all, the mortgages and trust deeds aforesaid,
76 whether executed by orator or by other companies, on any portions of said lines prior to the time when orator acquired the same, not only embracing the roads and tangible property of the companies executing said instruments, but also the revenues and incomes to be derived from the use of the parts of said roads so mortgaged, and the holders of the bonds secured by said mortgages have always insisted upon their rights to look to the revenues of the

sections of the railroad upon which the mortgages rested as a means of paying and discharging said bonds.

That all or nearly all of said mortgages embraced all rolling stock to be thereafter acquired by the company executing such mortgages, but that as such original companies and those lines of railroad have been gradually absorbed in orator's vast system, the rolling stock on said entire system has become so intermingled as to be incapable of division according to the original ownership of the said several lines of road or according to said several mortgages, and any attempt to control or dispose of portion of such rolling stock by any court or courts not having jurisdiction of the whole and not competent to deal with orator's entire property as a unit would produce great confusion and uncertainty and would result in great loss to all persons interested in said rolling stock or in orator's property or securities.

Further complaining, your orator would show to your honors that the directors and officers of your orator's company have thoroughly considered and already resorted to all proper measures for obtaining the means with which to pay the floating indebtedness of said company, and also to meet the large amounts of accruing interest which will fall due at the beginning of the month of June next and continue to mature by installments at very short intervals; but, may it please your honors, so it is that said officers and directors have hitherto wholly failed to provide the means with which
77 to discharge said floating indebtedness and to meet said accruing interest; that your orator is powerless now to accomplish such purpose, and for the time being at least is practically insolvent; that, in spite of all the exertion of orator and its officers, it is now certain that a default in the payment of interest maturing in June next will occur, and that orator will also be without means of meeting its floating indebtedness.

Your orator further showeth unto your honors that several of the leasehold interests possessed by orator are of extreme importance, as some of the lines so leased form valuable links in the chain of your orator's lines, as, for instance, a leasehold interest under the Western Indiana Railroad Company, by means of which orator reaches its terminus in the city of Chicago and is enabled to do a valuable business there.

That under the terms of said leases the lessor companies will be enabled to declare a forfeiture of orator's rights unless promptly paid the rentals accruing therefor, and that unless some provision is made by which such rentals as may shortly mature can be promptly met your orator's leasehold interests or some of them, of great value, will be declared forfeited and wholly lost to orator and orator's lines and power of earning money will be thereby very seriously affected.

And orator further alleges that a large portion of the rolling stock in use by orator and necessary to the transaction of its business is held under conditional contracts of purchase, the title to such property not vesting in orator until fully paid for, and orator is liable to lose said property and to a forfeiture of the amount already paid

thereon if it should make default in making further payments for such rolling stock as such payments mature.

Your orator further showeth unto your honors and avers upon information and belief that as soon as default shall be made in
78 the payment of bonded interest maturing early in the month of June next a large number of suits will be commenced at law in the numerous State courts along the line of orator's road, and that orator's supplies, materials, rolling stock, and other personal property will be seized under execution and attachment and your orator thereby deprived of the means of operating its road; that such a result would be almost if not quite ruinous to the prospect of orator with reference to earning a revenue, and more particularly disastrous because the present promise of an excellent crop in the West offers strong hope that a large revenue will be earned by orator or by the use of orator's lines of road in the near future; but if orator's rolling stock, materials, and supplies be seized under execution and attachment (as they undoubtedly will unless protected by the action of the court of equity) the benefits of moving the now growing crop and the large revenues to be fairly hoped for as arising from such traffic will be lost not only to orator but to all persons interested in orator's railroads and property.

And, further complaining, your orator also shows and alleges upon information and belief that, unless protected by a court of equity, as soon as the anticipated default aforesaid in the payment of interest shall occur a number of suits will be commenced in the State or Federal courts held near the line of orator's railroad for the appointment of receivers under the original sectional mortgages executed by the several corporations on portions of orator's lines before orator acquired the same.

That in that event orator's lines of road will be broken into fragments; that the unity of orator's system of roads will be entirely destroyed; that orator will be prevented from realizing a revenue from the use of its lines, and that in all probability orator's roads will be sold in small sections, so that it will be impossible to re-establish the unity thereof now existing.

79 And orator avers that the interests of orator in said road, and of all its creditors and holders of the bonds aforesaid, are greatly imperiled by the existing prospect of the disruption of said road on the happening of the default impending as aforesaid, and the interests of all parties can only be protected by the interposition of a court of chancery.

That if said lines of railroad are broken up as aforesaid, and the fragments thereof placed in the hands of various receivers, and the rolling stock, materials, and supplies seized and scattered abroad in the manner above indicated, the result will produce irreparable injury and damage, not merely to orator, but to all persons having any interest in said lines of road and the securities thereof; and in order that the extent and location of orator's lines of railroad may be better known, orator files a map showing the location of said lines and the States wherein they are situated, and marks said map

Exhibit G, and prays that same be taken as a part of the bill of complaint.

And, further complaining unto your honors, your orator would also show that your orator is now indebted in very large sums of money to a multitude of laborers who have little to live upon other than the fruits of their daily labor; that orator cannot state the amount of money so due to laborers, but avers it to be large, and that if payment of such indebtedness be not made, or at least secured by the action of court of equity by preventing the disruption of said property and the wasting of orator's assets, great and widespread suffering will ensue to said laborers and irreparable injury be thereby produced.

And your orator further showeth unto your honors that your orator and its board of directors, conceiving that it was their duty to protect said property and to treat the same as a trust fund for the security, first of its creditors, and then of orator's stock-
80 holders, have determined to appeal to your honors, sitting in chancery, to take possession of the said lines of road, through the instrumentality of one or more receivers, and thereby to prevent the breaking up of said lines of road and the scattering abroad of its assets in the manner above indicated.

And orator alleges upon information and belief that it is the intention of the trustees named in the general mortgage aforesaid, as soon as the impending default aforesaid shall occur and as soon as they may lawfully act under the terms of their trust, to proceed to foreclose the said general mortgage, and they intend to take steps in your honors' court for that purpose.

And orator on information and belief states that said trustees intend to proceed in this cause by means of a cross-bill to accomplish the said result above mentioned, but before said trustees could under the terms of their said trust file either an original bill or a cross-bill herein and on their motion obtain the appointment of a receiver or receivers, the evil results apprehended by orator and described as aforesaid will certainly occur and the property aforesaid, real and personal, will be broken up, the unity of orator's system destroyed, and its equipment scattered abroad.

Inasmuch as orator has not an adequate remedy at law in the premises, it prays your honors to take cognizance of this bill of complaint that, in order to the preservation of the interests of large numbers of persons, stockholders and creditors, unknown to orator, and in order to the protection of the interests of all concerned and to prevent a great multiplicity of suits, your honors will appoint one or more receivers and empower and direct such receiver or receivers to take possession of said entire property, and to preserve, operate, and manage and control the same, collect all indebtedness due or to become due to orator, and otherwise to discharge
81 all the duties ordinarily imposed by courts of equity on the receivers of railroad property by such courts appointed.

That on a final hearing of said cause your honors will, under this bill or under such amendments as may be made thereto or such supplemental bills as shall be filed herein or such cross-bills as

parties in interest may also file, decree the sale of said entire property, whether such decree shall judicially foreclose said general mortgage or any of the other mortgages aforesaid, or whether such decree shall dispose of said property as a trust fund on general equitable principles; that your honors will cause all the liens upon said property or any part thereof and all rights, claims, and equities of all persons interested therein — be ascertained, defined, and determined, and that the proceeds arising from the sale of such property or any part thereof be applied, under the orders and decrees of this court, according to the rights, interests, and equities of parties or persons interested in said fund.

Orator would further show that the moneys derived from the promissory notes as aforesaid, indorsed as aforesaid, were applied to the payment of interest accruing on bonds secured by the mortgages aforesaid prior and superior to the bonds secured by the general mortgage aforesaid, and also to the payment of maturing installments of the purchase-money of rolling stock necessary and indispensable to the use of orator's road, which payment was necessary in order to prevent the forfeiture of orator's interest in said rolling stock and its right to the use and possession thereof.

And your orator would further show that the said collateral trust which said endorsers have a right to rely upon as indemnity to them embraces a large amount of valuable rolling stock necessary to the operation of orator's lines of road, and it also embraces very valuable terminal facilities in the city of Chicago and in the other
82 cities aforesaid, by means of which orator is enabled to transact its important business in said cities, and without which orator would be unable to maintain its growing trade in said cities.

That it is now and will continue to be very important to orator that such receiver or receivers as your honors may appoint should prevent the foreclosure of said collateral trust and the loss of orator's terminal facilities aforesaid in the city of Chicago and said other cities, and the taking from orator of the valuable rolling stock embraced in said collateral trust, and your orator therefore specially prays your honors to make such preliminary orders or decrees or such orders and decrees as can be made at a very early date, enabling such receiver or receivers to protect the endorsers upon said promissory notes of orator, and thereby to prevent the foreclosure of said collateral trust and the loss of the rolling stock and terminal facilities hereinbefore last mentioned.

Orator also prays that such orders be made as would enable such receiver or receivers to raise money with which to pay all rentals accrued or accruing, the payment of which are necessary to prevent the forfeiture of orator's valuable leasehold interests, and thus prevent the breaking up of orator's lines.

That your honors will order and direct that said receivers, after paying the current expenses of operating and maintaining said railroads, and also paying for all labor, supplies, rentals, and services aforesaid, and also after protecting the endorsers aforesaid and thus preventing the forfeiture of orator's interests, rights, and property embraced in said collateral trust, and also after paying such

claims as require to be paid in order to prevent a forfeiture of orator's rights and interests in all rolling stock and equipments, apply the residue or surplus of all incomes, revenues, and earnings of said railroads, and all other assets coming into their hands
83 as such receivers, to the discharge of all debts, obligations, and liabilities of orator, according to the rights and legal and equitable priorities of all concerned as creditors or otherwise under the direction of the court.

And orator hereby makes defendants the following persons and corporations:

The Central Trust Company of New York as aforesaid, the same being a citizen and resident of the State of New York as aforesaid, and James Cheney, a citizen and resident of the State of Indiana as aforesaid, trustees under said general mortgage; also the St. Louis, Iron Mountain & Southern Railway Company, being a citizen and resident of the State of Missouri as aforesaid; also the Mercantile Trust Company of New York, the same being a citizen and resident of the State of New York as aforesaid. Also the following persons and corporations:

The Farmers' Loan & Trust Company of New York, a corporation organized under and by virtue of the laws of the State of New York; James R. Jessup, John T. Terry, Daniel A. Lindley, Alfred T. White, H. F. Spaulding, Wager Swayne, Lewis H. Meyer, J. P. Giraud Foster, Clifford A. Hand, Robert C. Martin, George P. Gould, George S. Coe, George T. Davis, George I. Seney, John Paton, all of whom are citizens and residents of the State of New York; Solon Humphreys, a citizen and resident of the State of New Jersey; Archibald Hopkins, a citizen and resident of Washington, D. C.; John M. Woodson, James B. Eads, H. F. Vail, and Charles Parsons, all of whom are citizens and residents of the State of Missouri; James Cheney, Abraham W. Hendricks, who are citizens and residents of the State of Indiana; H. W. Ford, R. S. Brock, G. E. Leighton, Thomas B. Coulter, P. H. Brown, R. A. Betts, George M. Rice, J. Kimball, E. P. Burnham, J. A. Jamison; the Eel River Railroad Company, a corporation of the State of Indiana and a citizen
84 and resident of said State; the Toledo, Peoria & Western Railroad Company, a corporation of the State of Illinois and a citizen and resident of the same; the Boone County & Booneville Railroad Company, St. Louis, Ottumwa & Cedar Rapids Railroad Company, the St. Joseph & St. Louis Railroad Company, the Brunswick & Chillicothe Railroad Company, St. Louis, Council Bluffs & Omaha Railroad Company, St. Louis, Kansas City & Northern Railway Company, a citizen and resident of the State of Missouri; Des Moines & St. Louis Railroad Company, St. Louis, Jerseyville & Springfield Railroad Company, a corporation of the State of Illinois and a resident and citizen of said State; Des Moines & Northwestern Railroad Company, a corporation, citizen, and resident of State of Illinois; Champaign & Southeastern Railroad Company; the St. Louis Bridge Company.

Your orator would show that all the above-named defendants have or claim to have interests in the lines of your orator as lessors,

mortgagors, or trustees under deeds of trust covering your orator's said lines or portions thereof.

And orator would further show upon information and belief that George Griswold and L. R. Tilton were co-trustees with James R. Jessup under the deed of trust mentioned in Exhibit A, made by the Illinois & Southern Iowa Railroad Company in March, 1862, and that said Griswold and Tilton have departed this life; also that Edwin D. Morgan, sole trustee of two of the mortgages mentioned in Exhibit A, attached to this complaint, has departed this life.

That Orville H. Browning, co-trustee of Solon Humphreys under the mortgage made by Quincy, Missouri & Pacific Railroad
85 Company in October, 1879, has also departed this life; and that H. F. Vail, co-trustee with Charles Parsons under the mortgage of the St. Charles bridge of October, 1878, has, as orator is informed and believes, also departed this life.

And the orator prays your honors to appoint successors to said trustees so deceased for the proper execution of their several trusts or to make such other order with respect thereto as will cause said trusts to be properly represented in the matters of this litigation.

Orator prays that all the defendants aforesaid and all such trustees as your honors may appoint be required to set up their several interests, so that the same may be fully represented in this cause.

And your orator avers that there is in this cause a dispute and controversy wholly between your orator and the said trustees under said general trust mortgage, and there is also a separate dispute and controversy in this cause wholly between orator and the trustees under the said several other mortgages herein set forth, and that such controversy may be determined as between orator and the trustees under each of said mortgages without reference to the other defendants herein.

Your orator prays that the said defendants and each of them may be required by a writ of subpœna to be and appear before your honors in the court of chancery on the first day of the next term of this court or as soon thereafter as proper service may be had upon them or either of them; that said defendants and each of them be required to answer this bill of complaint, but not upon oath, answer upon oath being hereby expressly waived.

That this court direct all persons and all corporations being possessed of the property of orator or any part of it to surrender the same to such receiver or receivers as your honors may appoint or to hold such property or portions of property under said re-
86 ceiver or receivers if the latter shall elect to pursue such course; and your orator states further to your honors that it is the intention of orator, as soon as a receiver or receivers shall be appointed as aforesaid and as soon as your honors have acquired primary jurisdiction of said cause and said property, to file like bills in the circuit courts of the United States of each of the districts into which such lines extend, praying such courts to take ancillary jurisdiction of said cause and to aid your honors in administering said property and disposing of the same according to the rights of all parties.

Orator further represents to your honors that it will become very important to the interest of your orator and its creditors that the operation of orator's lines of road should not be interrupted, and that business relations with other lines of railroad and with all persons engaged in the practical operation of orator's lines should be maintained and preserved, and to that end it will be necessary and important that the balance due to other lines of road and amounts due laborers, employees of various kinds, attorneys, and others performing professional services for orator, and also all claims for supplies and materials furnished orator, should be met and paid, otherwise it is very probable that a large number of laborers and other employees will suddenly abandon the service of orator and persons who have been furnishing materials and supplies to orator will suddenly cease to furnish the same, and therefore orator prays your honors to direct such receiver or receivers as may be appointed herein, out of the earnings of said road or out of any moneys available, to pay all such unsatisfied claims for current expenses, supplies, labor, exchange of traffic, and professional services, and that such payments include all the claims of the character aforesaid accruing or maturing within a reasonable time before the filing of this bill.

87 Orator further shows unto your honors that by reason of the number of defendants herein and by reason of their residences being in many instances far apart and by reason of the pressing need of the appointment of a receiver to prevent the disastrous consequences hereinbefore indicated, orator has not been able to serve notices upon all of the defendants of the application intended to be made for the appointment of a receiver or receivers, but orator has caused notice thereof, together with a copy of this bill, to be served on the trustees aforesaid of the Central Trust Company of New York and defendant Cheney, who represent the largest interest and most important creditors of orator; and orator has also caused like notice to be served upon the defendant.

And orators prays your honors to make such order in the premises as will insure the protection of the interests of orator and its creditors, giving an opportunity to all the defendants not served with notice to be heard hereafter; and orator avers that no injury can arise to any creditor or person in interest from the appointment of the said receivers with or without notice, as such receivers' possession will enure to the benefit of all the persons concerned.

And your orator prays such other and further relief as the nature of its case may demand and as shall seem to your honors consistent with equity and good conscience.

And your orator, as in duty bound, will ever pray, &c.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY,
By WAGER SWAYNE, *Solicitor for Complainant.*

88 STATE OF NEW YORK, }
County of New York. }

Before me, William J. Harding, a notary public in and for the

county and State aforesaid, on this 22d day of May, A. D. 1884, at my office, in said county, personally appeared A. L. Hopkins, who, being by me duly sworn, makes oath as follows:

"I, Amos L. Hopkins, do hereby depose and say that I am now and have been for a long space of time vice-president of the Wabash, St. Louis & Pacific Railway Company and one of the executive officers of said company; that under my official relations with said company I am as well informed of the facts and statements set forth in the foregoing bill of complaint as any other officer of said company; and I further say that all the averments and statements contained in said bill of complaint and in the bill made part thereof are true as I am informed and verily believe; and further I say not.

A. L. HOPKINS.

Sworn and subscribed before me the day and year last above written.

Witness my hand and notarial seal.

WM. J. HARDING,

[SEAL.] *Notary Public, Kings County, New York.*

Certificate filed in New York county.

(8424 A.)

89 On the 27th day of May, 1884, Solon Humphreys and Thomas E. Tutt were appointed receivers of all the railroad and property of said Wabash, St. Louis and Pacific Railway Company by an order of said court, which is in the following words and figures, to wit:

Order Appointing Receivers.

WABASH, ST. LOUIS & PACIFIC R'Y CO., Complainant,
vs.
CENTRAL TRUST CO. OF N. Y. *et al.*, Defendants. } 2357.

Now comes the complainant, by Wager Swayne, its solicitor, and files its bill of complaint, and also makes application for the appointment of a receiver herein.

Now, on this 27th day of May, comes the said complainant, by its solicitors and counsel, and, having filed its bill of complaint and exhibits herein, prays the court to appoint a receiver or receivers with power to take possession of, manage, operate, control, and preserve all the railroads owned, operated, or leased by the said complainant, and also all property of every description, real, personal, and mixed, and all rights, credits, and choses in action of the said complainant, whether situated within the said eastern district of Missouri or elsewhere.

And the complainant having, by the said bill of complaint and exhibits forming a part thereof, shown the court that there is great danger of loss, waste, and destruction of the property of complainant or valuable parts thereof unless such receiver or receivers be appointed, and the application having been, by the Hon. Samuel Treat, district

judge for the eastern district of Missouri, referred to me for consideration, and the court having duly considered said application, it is—

Ordered, adjudged, and decreed that Solon Humphreys and Thomas E. Tutt be, and the same are hereby, appointed receivers of the said railroads and all the property of said company, with
90 power and instructions to take possession of the same and to manage, control, and operate said railroad, preserve and protect all said property, and collect, as far as possible, all accounts, choses in action, and credits due to said company, acting in all things under the order of this court or of such other courts as may entertain jurisdiction of parts of said property as ancillary to the jurisdiction of this court.

That the receivers before entering upon their duties give their joint and several bond to the master in chancery of this court, for the benefit of all whom it may concern, in the penal sum of five hundred thousand dollars, conditioned for the faithful performance by said receivers of their duties as such, and that they will in all things observe and perform the orders of this court now or hereafter to be made.

It is further ordered that the said receivers out of the income that shall come into their hands from the operation of said railroad or otherwise proceed to pay all balances due to other railroads or transportation companies or balances growing out of the exchange of traffic accruing during six months prior hereto.

That said receivers also in like manner pay all rental accrued or which may hereafter accrue upon all leased lines of said complainant and for the use of all terminals or track facilities and all such rentals or installments as may fall due from said complainant for the use of any portion of road or roads or terminal facilities of any other company or companies, and also for all rentals due or to become due upon rolling stock heretofore sold to complainant and partially paid for.

That said receivers also pay in like manner out of any incomes or other available revenues which may come into their hands
91 all just claims and accounts for labor, supplies, professional services, salaries of officers and employees that had been earned or have matured within six months before the making of this order.

That said receivers present their said bond to this court or any judge thereof for approval, and that upon said presentation and approval of said bond said receivers are entitled and required to proceed at once with the performance of their duties.

It is further ordered that all parties herein, upon being informed of this order and of the approval of said bond by this court, proceed to surrender all the lines of said railroad and all the property, choses in action, and accounts of said company to said receivers, and the complainant is authorized to apply to any other United States circuit court of competent jurisdiction for such order or orders in aid of the primary jurisdiction vested in this court in said cause as may have ancillary jurisdiction herein.

It is further ordered that said receivers pay all current expenses in the operation of said road, collect all the revenues thereof, and all choses in action, accounts, and credits due and to become due to the company.

That such receivers keep such accounts as may be necessary to show the source from which all such income and revenues shall be derived with reference to the interest of all parties herein and the expenditures by them made.

That said receivers report to this court from time to time, once in three months, their doings under this decree, and that they apply for instructions to this court when necessary.

And the receivers having filed their bond as required by this order, and the court having fully approved the same, said appointment is hereby confirmed, and said receivers are hereby required to proceed with their duties under said appointment.

DAVID J. BREWER,
Circuit Judge.

92 And thereupon the said receivers, Solon Humphreys and Thomas E. Tutt, present their bond in the penal sum of $500,000, which is approved and ordered to be filed.

AT CHAMBERS, *May 29th*, 1884.

WABASH, ST. LOUIS & PACIFIC R'Y CO., Complainant,
vs.
CENTRAL TRUST CO. of N. Y. *et al.*, Defendants. } 2357.

The order heretofore entered in this case for the appointment of receivers is modified by striking out of the third paragraph of said order the words "to the master in chancery of this court," so that the paragraph shall read as follows: "That the receivers, before entering upon their duties, give their joint and several bond, for the benefit of all whom it may concern, in the penal sum of five hundred thousand dollars, conditioned for the faithful performance by said receivers of their duties as such, and that they will in all things observe and perform the orders of this court now or hereafter to be made."

On the 9th day of June, 1884, there was filed in said court in said cause No. 2357, by leave of court, the cross-bill of said Central Trust Company of New York and James Cheney, setting up default in the installment of interest due June 1st, 1884, and praying for the foreclosure of the mortgage in which said Central Trust Company and James Cheney are trustees, styled "general mortgage," certain mortgages executed in aid of said "general mortgage" and styled in said cross-bill "sustaining mortgages," and the sale of the property covered thereby and for a receiver.

On the 15th day of June, 1884, there was filed in said cause No. 2357, by leave of court, an amended bill of complaint by said
93 Wabash, St. Louis and Pacific Railway Company, setting forth with more particularity than in said original bill the condition of the lines of railroad belonging to said company, the title of

said company to the various parts thereof, the liens and encumbrances thereon, and the financial condition of said company, all of which were substantially as shown in the final decree. Said amended bill embraced additional parties defendant, and prayed substantially the relief in said original bill.

On the 26th day of June, 1884, the said receivers filed in said court in said cause a petition as follows:

94 In the Circuit Court of the United States for the Eastern District of Missouri, March Term, A. D. 1884.

THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, Complainant,
against
THE CENTRAL TRUST COMPANY OF NEW YORK, James Cheney, The Mercantile Trust Company of New York, and Others, Defendants. } In Chancery.

Petition of receivers for advice of court—1st, as to payment of interest on certain enumerated bonds; 2d, as to payment of interest on bonds of Chicago division; 3d, as to payment of rental of Eel river railroad; 4th, as to payment of interest on Detroit, Butler and St. Louis railroad; 5th, as to how they shall keep accounts of the earnings and expenses of certain enumerated lines. Filed June 26, 1884.

Now come Solon Humphreys and Thomas E. Tutt, receivers of all the property, rights, and credits of the Wabash, St. Louis & Pacific Railway Company, and respectfully state to the court that from the incoming rents and profits of said property they
95 were unable to pay on the first day of June, 1884, the interest falling due on said date upon the following bonds and other obligations of said company, to wit:

1st. Twelve hundred and ten (1,210) bonds of one thousand dollars each, known as the first-mortgage bonds of the Havana division, issued in December, 1880, due thirty years after date, and bearing interest at the rate of six per cent. per annum, payable semi-annually on the first days of June and December in each year, and which interest so due on said first day of June amounted to $36,300.00.

2d. Two thousand (2,000) bonds of one thousand dollars each, known as the first-mortgage bonds of the Indianapolis division, issued June, 1881, due forty years after date, and bearing interest at the rate of six per cent. per annum, payable semi-annually on the first days of June and December in each year, and which interest so due on said first day of June amounted to $60,000.00.

3d. Seventeen thousand (17,000) bonds of one thousand dollars each, known as the general mortgage bonds, issued June, 1880, due forty years after date, and bearing interest at the rate of six per cent. per annum, payable semi-annually on the first days of June and December in each year, and which interest so due on said first day of June amounted to $480,000.00.

4th. Two thousand seven hundred and nine-two (2,792) shares of the capital stock of the Eel River Railroad Company, on which the Wabash, St. Louis and Pacific Railway Company had obligated itself to pay dividends at the rate of four per cent. per annum, and on which the quarterly dividend due on said first day of June was $27,920.00.

96 Your petitioners further state that the Wabash, St. Louis and Pacific Railway Company was organized on the tenth day of November, 1879, by the consolidation of what was formerly known of the "Wabash Railway Company" (a corporation previously existing under the laws of Illinois, Indiana, and Ohio) with the St. Louis, Kansas City and Northern Railway Company (a corporation previously existing under the laws of Missouri), which companies were at and before said date possessed of certain valuable lines of railroad in the States of Missouri, Iowa, Illinois, Indiana, and Ohio, but which were held by them subject to mortgages and deeds of trust previously executed to secure certain bonds and obligations, to wit:

1st. Six thousand (6,000) bonds of one thousand dollars each, secured by first mortgage on the North Missouri railroad, (which bonds were) issued in March, 1865, due thirty years after date, with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of January and July of each year, and on which the semi-annual interest falling due on the first day of July, 1884, amounts to $210,000.00

2d. Six hundred and twenty-six (626) bonds of one thousand dollars each, secured by first mortgage on the St. Louis, Council Bluffs and Omaha railroad, (which bonds were) issued in July, 1878, due thirty years after date, with interest at the rate of six per cent. per annum, payable semi-annually on the first days of January and July in each year, and on which the semi-annual interest due on said first day of July amounts to $18,780.00.

3d. Two hundred and sixty-four (264) bonds of one thousand dollars each, known as the first-mortgage bonds of the Clarinda branch, issued in July, 1879, due forty years after date, with interest

97 at the rate of six per cent. per annum, payable semi-annually on the first days of February and August in each year, and on which the semi-annual interest due on the first day of August, 1884, amounts to $7,920.00.

4th. Nine hundred (900) bonds of one thousand dollars each, secured by first mortgage of the Toledo and Illinois railroad, issued in September, 1853, and falling due in August, 1890, with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of February and August in each year, and on which the semi-annual interest falling due on said first day of August amounts to $31,500.00.

5th. Two thousand five hundred (2,500) bonds of one thousand dollars each, secured by first mortgage on the Lake Erie, Wabash and St. Louis railroad, issued in August, 1853, falling due in August, 1890, with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of February and August in

each year, and on which the semi-annual interest falling due on said first day of August amounts to $87,500.00.

6th. Twenty-four hundred and ninety-six (2,496) bonds of one thousand dollars each, secured by first mortgage on what was known as the Great Western railroad, issued in May, 1863, and falling due in May, 1888, with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of February and August in each year, and on which the interest falling due on said first day of August amounts to $87,360.00.

7th. Three hundred (300) bonds of one thousand dollars each, secured by first mortgage on what was known as the Illinois and Southern Iowa railroad, issued in March, 1862, due twenty
98 years after date, with interest at the rate of six per cent. per annum, payable semi-annually on the first days of February and August in each year, and on which the semi-annual interest falling due on said first day of August amounts to $9,000.

8th. Twenty-seven hundred (2,700) bonds of one thousand dollars each, secured by first mortgage on what was known as the Decatur and East St. Louis railroad, issued in June, 1869, due twenty years after date, with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of February and August in each year, and on which the semi-annual interest falling due on said first day of August amounts to $94,500.00.

9th. Twenty-six hundred and ten (2,610) bonds of one thousand dollars each, known as the consolidated sinking-fund bonds of the Toledo, Wabash and Western railroad, issued in February, 1867, due forty years after date, with interest at the rate of seven per cent. per annum, payable quarterly on the first days of February, May, August, and November in each year, and on which the interest falling due on said first day of August amounts to $45,675.00.

10th. Eleven hundred and thirty-one (1,131) bonds of five hundred dollars each, known as the Wabash railway funded-debt bonds, issued in 1877, due thirty years after date, with interest at the rate seven per cent. per annum, payable semi-annually on the first days of February and August in each year, and on which the semi-annual interest falling due on said first day of August amounts to $19,792.50.

11th. Fourteen hundred and one (1,401) bonds of one thousand dollars each, known as the Wabash railway funded-debt bonds, graduated, issued in 1877, due thirty years after date, with
99 interest at the rate of six per cent. per annum, payable semi-annually on the first days of February and August in each year, and on which the semi-annual interest falling due on the said first day of August amounts to $42,030.00.

12th. Six hundred and nine (609) bonds of five hundred dollars each, secured by first mortgage on what was known as the Brunswick and Chillicothe railroad, issued August 1st, 1878, falling due in August, 1903, with interest at the rate of six per cent. per annum, payable semi-annually on the first days of February and August in each year, and on which the semi-annual interest falling due on said first day of August amounts to $9,135.

13th. Three thousand (3,000) bonds of one thousand dollars each, known as the real-estate and railway mortgage bonds of the St. Louis, Kansas City and Northern Railway Company, issued in September, 1874, due twenty-one years after date, with interest at the rate of seven per *per* cent. per annum, payable semi-annually on the first days of March and September in each year, and on which the semi-annual interest falling due on the first day of September, 1884, amounts to the sum of $105,000.

14th. Certain certificates of indebtedness, amounting to the sum of $552,975.50, known as the graduated scrip*t* certificates, issued in 1877, with interest at the rate of six per cent. per annum, payable on the first days of September, October, and November, and on which the interest falling due on said first day of September amounts to $11,059.51.

15th. Certificates of indebtedness, amounting to the sum of $115,385, known as seven per cent. scrip*t* certificates, issued
100 in 1877, with interest at the rate of seven per cent. per annum, payable on the first days of September, October, and November, and on which the interest falling due on said first day of September amounts to $2,692.31.

16th. Two thousand (2,000) bonds of one thousand dollars each, known as the Wabash railway series of 1879, issued in May of said year, due thirty years after date, with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of April and October in each year, and on which the semi-annual interest falling due on the first day of October, 1884, amounts to $70,000.

17th. One thousand (1,000) bonds of one thousand dollars each, known as the first-mortgage bonds of the St. Charles Bridge Company, issued in October, 1878, due thirty years after date, with interest at the rate of six per cent. per annum, payable semi-annually on the first days of April and October in each year, and on which the interest falling due on said first day of October amounts to $30,000.

18th. Seven hundred and seventy-seven (777) bonds of five hundred dollars each, known as the second-mortgage bonds on the St. Charles bridge, issued in 1878, falling due in 1903, with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of April and October of each year, and on which the interest falling due on said first day of October amounts to $13,597.50.

19th. Six hundred and forty-five (645) bonds of five hundred dollars each, known as the first-mortgage bonds of the St. Louis, Ottumwa and Cedar Rapids Railroad Company, issued October 1st, 1875, due in October, 1897, with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of April and October of each year, and on which the semi-annual interest falling due on said first day of October amounts to $11,287.50.

101 20th. Twenty-three hundred and fifty (2,350) bonds of one thousand dollars each, known as the first-mortgage bonds of the Omaha division of the St. Louis, Kansas City and Northern railway, issued February, 1879, due forty years after date, with interest at the rate of seven per cent. per annum, payable semi-annu-

ally on the first days of April and October in each year, and on which the semi-annual interest falling due on said first day of October amounts to $82,250.

21st. Five hundred (500) bonds of one thousand dollars each, known as the first-mortgage bonds of the Quincy and Toledo railroad, issued in May, 1865, falling due in November, 1890, with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of May and November in each year, and on which the semi-annual interest falling due on the first day of November, 1884, is $17,500.

22nd. One thousand (1,000) bonds of one thousand dollars each, known as the second-mortgage bonds of the Toledo and Wabash railroad, issued in September, 1853, due forty years after date, with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of May and November in each year, and on which the semi-annual interest due on said first day of November is $35,000.

23rd. Fifteen hundred (1,500) bonds of one thousand dollars each, known as the second-mortgage bonds of the Wabash and Western railroad, issued in October, 1858, falling due in May, 1893, with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of May and November in each year, and on which the semi-annual interest due on said first day of November amounts to $52,500.

102 24th. Twenty-five hundred (2,500) bonds of one thousand dollars each, known as the second-mortgage bonds of the Great Western railroad of 1859, issued in May, 1865, and falling due in May, 1893, with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of May and November of each year, and on which the semi-annual interest falling due on said first day of November amounts to $87,500.

25th. One hundred (100) bonds of one thousand dollars each, known as the first-mortgage bonds of the Boone county and Boonville railroad, issued in May, 1873, and falling due in May, 1903, with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of May and November of each year, and on which the semi-annual interest due on said first day of November is $3,500.

26th. Five hundred (500) bonds of one thousand dollars each, known as the first-mortgage bonds of the Hannibal and Naples Railroad Company, issued in May, 1879, due thirty years after date, with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of June and December of each year, and on which the semi-annual interest due on the first day of December, 1884, amounts to $17,500.

Your petitioners further state that the Wabash, St. Louis and Pacific, for the purpose of increasing its business and revenue, and thereby adding to the value of all lines previously owned and operated by it, acquired by consolidation with the Chicago and Strawn Railway Company in 1880 what is now known as its Chicago division, which division extends from Strawn, in the county of Living-

ston, to the city of Chicago, in the State of Illinois, subject,
103 however, to the payment of the principal and interest of four thousand five hundred (4,500) bonds of one thousand dollars each, secured by a first mortgage thereon, which bonds were issued in July, 1880, due thirty years after their date, with interest at the rate of five per cent. per annum, payable semi-annually on the first days of January and July in each year, and on which the semi-annual interest due on the first day of July, 1884, is $112,500.

That said company, for the same purpose, also acquired, in 1880, by consolidation with the Detroit, Butler and St. Louis Railroad Company, a line extending from Butler, in the State of Indiana, to Detroit Junction, in the State of Michigan, subject, however, to the payment of the principal and interest of two thousand and fifty-two (2,052) bonds of one thousand dollars each, secured by first mortgage thereon, which bonds were issued in July, 1881, due forty years after date, with interest at the rate of six per cent. per annum, payable semi-annually on the first days of January and July in each year, and on which the semi-annual interest due on the first day of July, 1884, amounts to $61,560.

Your petitioners further state that they are advised and believe that each and all of the aforesaid lines of railroad which were owned or controlled either by the "Wabash Railway Company" or by the "St. Louis, Kansas City and Northern Railway Company" before their consolidation, in 1879, under the name of the "Wabash, St. Louis and Pacific Railway Company," together with the aforesaid Chicago and Strawn railroad, which was subsequently acquired in the manner hereinbefore recited, have at all times during the five years last past, or ever since their construction, earned more than enough to pay all their operating expenses, the cost of main-
104 tenance, and interest upon the several series of bonds above described and respectively secured upon them by the mortgages or deeds of trust aforesaid.

Your petitioners state that while they are informed and believe that the earnings of the line of railroad extending from Logansport, in the State of Indiana, to Butler, in said State, and known as the Eel River railroad, have not been sufficient to pay the operating expenses, the cost of maintenance, and the rental of four per cent. per annum on twenty-seven thousand nine hundred and twenty (27,920) shares of the capital stock of said Eel River Railroad Company, as provided in the lease under which the Wabash, St. Louis and Pacific Railway Company acquired the same; and while they are further informed and believe that the earnings of the line extending from Butler, in the State of Indiana, to Detroit Junction, in the State of Michigan, have not as yet been sufficient to pay its operating expenses, the cost of maintenance, and interest upon the bonds secured by first mortgage on the same, yet, after the most careful consideration of the matter, they express the opinion that it would not be wise or for the best interests of said company or its several creditors for your petitioners to lose control of said lines, extending, as they do, to the city of Detroit, and there connecting with the systems of railroads reaching eastward therefrom.

Your petitioners further state that the Wabash, St. Louis and Pacific Railway Company, after its organization as aforesaid, acquired by purchase, lease, and consolidation divers other lines of railroad in said States, subject, however, to certain mortgages and deeds of trust previously executed to secure bonds and other obligations as follows, to wit:

1st. The Quincy, Missouri and Pacific railroad, subject to a
105 mortgage to secure twelve hundred and four (1,204) bonds of one thousand dollars each, known as the first-mortgage bonds of said Quincy, Missouri and Pacific Railroad Company, issued in October, 1879, due thirty years after date, and bearing interest at the rate of six per cent. per annum, payable semi-annually on the first days of January and July in each year, and on which the interest falling due on the first day of July, 1884, amounts to the sum of $36,120.00.

2d. The Indianapolis, Peru and Chicago railroad, subject to a mortgage executed to secure two hundred and seventy-five (275) bonds of one thousand dollars each, known as the first-mortgage bonds of said Indianapolis, Peru and Chicago Railroad Company, issued in July, 1871, due twenty years after date, and bearing interest at the rate of seven per cent. per annum, payable semi-annually on the first days of January and July in each year, and on which the interest falling due on said first day July amounts to $9,625.00.

3d. The Chicago, Cincinnati and Louisville railroad, subject to mortgage executed to secure one thousand (1,000) bonds of one thousand dollars each, known as the first-mortgage bonds of said Chicago, Cincinnati and Louisville Railroad Company, issued in January, 1867, due twenty years after date, and bearing interest at the rate of seven per cent. per annum, payable semi-annually on the first days of January and July in each year, and on which the interest falling due on said first day of July amounts to $35,000.

4th. The Toledo, Peoria and Western railroad, subject to a mortgage executed to secure forty-five hundred (4,500) bonds of one thousand dollars each, known as the first-mortgage bonds of said Toledo, Peoria and Western Railroad Company, issued May 22,
1880, due May 1, 1907, and bearing interest at the rate of
106 seven per cent. per annum, payable quarterly on the first days of January, April, July, and October in each year, and on which the interest falling due on said first day of July is the sum of $78,750.

5th. The Toledo, Peoria and Western, subject to a mortgage executed to secure eleven hundred and eighty-nine (1,189) bonds of one thousand dollars each, known as the preferred income first-mortgage bonds of said Toledo, Peoria and Western Railroad Company, issued —— —, 188–, due in — years after date, and bearing interest at the rate of four per cent. per annum, payable semi-annually on the first days of January and July in each year, and on which the interest falling due on said first day of July amounts to $23,780.

6th. The Havana, Rantoul and Eastern railroad, subject to a mortgage executed to secure three hundred (300) bonds of one thousand dollars each, known as the first-mortgage bonds of said Havana,

Rantoul and Eastern Railroad Company, issued in July, 1879, due in July, 1897, and bearing interest at the rate of seven per cent. per annum, payable semi-annually on the first days of January and July in each year, and on which the interest falling due on said first day of July amounts to $10,500.

7th. The Centerville, Moravia and Albia railroad, subject to a mortgage executed to secure four hundred (400) bonds of one thousand dollars each, known as the first-mortgage bonds of said Centerville, Moravia and Albia Railroad Company, issued in ——, 188–, due — years after date, bearing interest at the rate of six per cent. per annum, payable semi-annually on the first days of January and July in each year, and on which the interest falling due on said first day of July is the sum of $12,000.

107 8th. What is known as the Cairo division, subject to a mortgage executed to secure thirty-eight hundred and fifty-seven (3,857) bonds of one thousand dollars each, known as the first-mortgage bonds of said Cairo division, issued in October, 1881, due fifty years after date, with interest at the rate of five per cent. per annum, payable semi-annually on the first days of January and July in each year, and on which the interest falling due on said first day of July amounts to $96,425.

9th. The Champaign, Havana and Western railroad, subject to a mortgage executed to secure thirty-four hundred and nine (3,409) bonds of one hundred dollars each, known as the first-mortgage bonds of said Champaign, Havana and Western Railroad Company, issued in ——, 188–, due — years after date and bearing interest at the rate of seven per cent. per annum, payable semi-annually on the first days of January and July in each year, and on which the interest falling due on said first day of July amounts to $11,931.50.

10th. What is known as the Iowa division of said railroad, subject to a mortgage executed to secure twenty-two hundred and sixty-nine (2,269) bonds of one thousand dollars each, secured by first mortgage on said Iowa division, issued in March, 1881, due forty years after date, with interest at the rate of six per cent. per annum, payable semi-annually on the first days of March and September in each year, and on which the interest falling due on the first day of September, 1884, amounts to $68,070.

Your petitioners further state that they are informed and believe that the earnings of none of the lines or divisions last above described have at any time since their acquisition been sufficient to pay their operating expenses, the cost of their maintenance,

108 and interest on the several series of bonds and other obligations above described and secured upon each of them respectively by mortgage or deeds of trust.

Your petitioners further state that from the incoming rents and profits of the property now in their possession, under a former order of this honorable court, they believe they can, until otherwise directed, pay all the expenses of operating the same, the cost of maintenance, and all interest from time to time maturing on all bonds or other obligations secured by mortgage or deeds of trusts on the several lines or divisions thereof that were owned or possessed either by

the "Wabash Railway Company" or by the "St. Louis, Kansas City and Northern Railway Company" before their consolidation, as aforesaid, under the name of the "Wabash, St. Louis and Pacific Railway Company."

Wherefore, inasmuch as the incoming rents and profits from the lines and each of them that were united, as aforesaid, in 1879, by consolidation, as aforesaid, have hitherto been and will, as your petitioners believe, continue to be more than sufficient to pay their operating expenses, the cost of maintenance, and interest on all the aforesaid bonds or other obligations secured upon them or either of them by mortgage or deed of trust; and inasmuch as the existence of said consolidated company as an entirety, with all its rights and franchises, will be preserved and the rights and interests of its several creditors will be best protected and secured by paying from time to time the interests upon the bonds and other obligations secured by mortgage on the several lines and divisions last aforesaid; and inasmuch as the earnings upon the aforesaid Chicago division have been and will, as your petitioners believe, con-
109 tinue to be more than sufficient to pay its operating expenses, the cost of maintenance, and all interest on bonds secured thereon by mortgage; and inasmuch as your petitioners believe (for the reasons hereinbefore stated) that it would be a detriment to all said lines and work great injury to said company and all its creditors for your petitioners to lose control of the line extending from Logansport, in the State of Indiana, to Detroit, in the State of Michigan; and inasmuch as the earnings upon the several other lines hereinbefore mentioned as having been acquired by the Wabash, St. Louis and Pacific Railroad Company have not been and, as your petitioners are informed and believe, will not for the present be sufficient to pay operating expenses, the cost of maintenance, and interest on the several series of bonds secured by mortgage or deed of trust upon them respectively—

Your petitioners therefore pray for the advice of this honorable court with respect to the several matters following, to wit:

1st. As to whether your petitioners shall, until the further orders of this court, pay the interest as the same from time to time matures upon the bonds or other obligations secured by mortgage on the several lines or divisions of said road at and before the date of the consolidation of the Wabash Railway Company with the St. Louis, Kansas City and Northern Railway Company.

2d. As to whether your petitioners shall, until the further orders of this court, pay the interest upon the bonds secured by mortgage upon what is known as the Chicago division of said railroad.

3d. As to what they shall do with respect to the payment of rental upon the line extending from Logansport to Butler, in the State of Indiana.

110 & 111 4th. As to what they shall do with respect to the payment of interest upon the bonds secured by mortgage on the line extending from Butler, Indiana, to Detroit Junction, in the State of Michigan.

5th. As to how they shall dispose of the earnings and keep the

accounts of the earnings and of the operating expenses and cost of maintenance of the several other lines or divisions aforesaid, and which have not and which, your petitioners are informed and believe, will not for the present be enough to pay their operating expenses, the cost of maintenance, and interest on the several series of bonds secured by mortgage upon them respectively.

SOLON HUMPHREYS AND
THOMAS E. TUTT, *Receivers*,
By WELLS H. BLODGETT, *Solicitor*.

On the 28th day of June, 1884, the special master in chancery to whom was referred the last-mentioned petition made the following report, which was approved by the court:

112 In the Circuit Court of the United States for the Eastern District of Missouri, March Term, A. D. 1884.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*, Complainants,
against
THE CENTRAL TRUST COMPANY OF NEW YORK, James Cheney, The Mercantile Trust Company of New York, and Others, Defendants. } In Chancery.

Report of Edmund T. Allen, special master, and order of court made thereon, 1st, concerning the payment of interest on certain bonds herein mentioned; 2d, concerning payment of interest on bonds of Chicago division; 3d, concerning the keeping of accounts of earnings and expenses of certain lines. Filed June 28th, 1884.

In the matter of the petition of Solon Humphreys and Thomas E. Tutt, receivers of all the property, rights, and credits of
113 the Wabash, St. Louis and Pacific Railway Company, wherein they pray for the advice of this honorable court with respect to the following, among other, matters, to wit:

1st. As to whether they shall, until the further orders of the court, pay the interest as the same from time to time matures upon the bonds or other obligations secured by mortgage on the several lines or divisions of said road, at and before the date of the consolidation of the Wabash railway with the St. Louis, Kansas City and Northern railway.

2d. As to whether they shall, until the further orders of this court, pay the interest on the bonds secured by mortgage upon what is known as the Chicago division of said railroad.

* * * * * * *

5th. As to how they shall dispose of the earnings and keep the accounts of the earnings and of the operating expenses and cost of maintenance of the several other lines or divisions aforesaid and which have not and which, your petitioners are informed and believe, will not for the present be enough to pay their operating ex-

penses, the cost of maintenance, and interest on the several series of bonds secured by mortgage upon them respectively.

I beg leave to report that upon the testimony taken before me on the 26th and 27th days of June, 1884 (a transcript of the oral evidence being herewith submitted), I find that the Wabash, St. Louis and Pacific Railway Company was organized on the 10th day of November, 1879, by consolidation of the lines of what was formerly known as the "Wabash Railway Company" (a corporation which previously existed under the laws of Illinois, Indiana, and Ohio) with the line of the St. Louis, Kansas City and Northern
114 Railway Company (a corporation previously existing under the laws of Missouri), and that said companies were, at and before the date of their consolidation, possessed of certain lines of railroad in the States of Missouri, Iowa, Illinois, Indiana, and Ohio, but which were held by them subject to mortgages and deeds of trust previously executed to secure certain bonds and obligations on parts or divisions thereof.

And I further find that the Wabash, St. Louis and Pacific Railway Company, after its organization, acquired in 1880 what is now known as its Chicago division, subject, however, to the lien of a certain mortgage previously executed to secure the payment of the principal and interest of forty-five hundred (4,500) bonds of one thousand dollars each, due thirty years after date, with interest at the rate of five per cent. per annum, payable semi-annually on the first days of January and July in each year, and on which the semi-annual interest due on the first day of July, 1884, is $112,500.

And I further find that all the lines of railroad that were owned or controlled either by the Wabash Railway Company or by the St. Louis, Kansas City and Northern Railway Company, and which are hereinafter mentioned, have, ever since their consolidation, earned more than enough to pay all the operating expenses, the cost of maintenance, taxes, and interest upon the several series of bonds hereinafter described and secured upon them respectively — mortgage or deed of trust, and that the Chicago division has also, ever since the date of its acquisition by the Wabash, St. Louis and Pacific Railway Company, earned more than enough to pay all its operating expenses, the cost of maintenance, taxes, and interest upon the forty-five hundred (4,500) bonds of one thousand dollars each, secured thereon by mortgage as aforesaid.

115 Wherefore I respectfully recommend that the court make and enter in said cause the following order, to wit:

It is ordered that until otherwise directed the receivers herein, from the incoming rents and profits of said property, after meeting such other obligations as they have been directed to discharge by the former orders of this court, pay from whatever balance may remain in their hands the interest, as the same shall from time to time mature, upon the following bonds or other obligations secured by mortgage on the several lines or divisions of the "Wabash Railway Company" and of the "St. Louis, Kansas City and Northern Railway Company" before the date of their consolidation under the

name of the "Wabash, St. Louis and Pacific Railway Company," to wit:

On the first days of January and July (or as soon thereafter as practicable), the semi-annual interest, at seven per cent. per annum, then due on six thousand (6,000) bonds of one thousand dollars each, issued in 1865 and secured by mortgage upon the North Missouri railroad, amounting to $210,000.00.

The semi-annual interest, at six per cent. per annum, then due on six hundred and twenty-six (626) bonds of one thousand dollars each, issued in 1878 and secured by mortgage on the St. Louis, Council Bluffs and Omaha railroad, amounting to $18,780.00.

On the first days of February and August (or as soon thereafter as practicable), the semi-annual interest, at six per cent. per annum, then due on two hundred and sixty-four (264) bonds of one thousand dollars each, issued in July, 1879, and secured by mortgage on the Clarinda and St. Louis railroad (otherwise known as the Clarinda branch), amounting to $7,920.00.

116 The semi-annual interest, at seven per cent. per annum, then due on nine hundred bonds of one thousand dollars each, issued in 1853 and secured by mortgage on the Toledo and Illinois railroad, amounting to $31,500.00.

The semi-annual interest, at seven per cent. per annum, then due on twenty-five hundred (2,500) bonds of one thousand dollars each, issued in 1853 and secured by mortgage on the Lake Erie, Wabash and St. Louis railroad, amounting to $87,500.00.

The semi-annual interest, at seven per cent. per annum, then due on twenty-four hundred and ninety-six (2,496) bonds of one thousand dollars each, issued in 1863 and secured by mortgage on what is known as the Great Western railroad, amounting to $87,360.00.

The semi-annual interest, at the rate of six per cent. per annum, then due on three hundred (300) bonds of one thousand dollars each, issued in 1862 and secured by mortgage on the Illinois and Southern Iowa railroad, amounting to $9,000.

The semi-annual interest, at seven per cent. per annum, then due on two thousand seven hundred (2,700) bonds of one thousand dollars each, issued in June, 1869, and secured by mortgage on the Decatur and East St. Louis railroad, amounting to $94,500.00.

On the first days of February, May, August, and November (or as soon thereafter as practicable), the quarterly interest, at seven per cent. per annum, then due on two thousand six hundred and ten (2,610) bonds of one thousand dollars each, issued in 1867 and secured by mortgage on the Toledo, Wabash and Western railroad, amounting to $45,675.00.

117 On the first days of February and August (or as soon thereafter as practicable), the semi-annual interest on eleven hundred and thirty-one (1,131) bonds of five hundred dollars each, issued 1877, known as the Wabash railway funded debt bonds, amounting to $19,792.50.

The semi-annual interest, at six per cent. per annum, then due on fourteen hundred and one (1,401) bonds of one thousand dollars

each, issued in 1877, known as the Wabash railway funded debt bonds, graduated, amounting to $42,030.00.

The semi-annual interest, at six per cent. per annum, then due on six hundred and nine (609) bonds of five hundred dollars each, issued in August, 1878, and secured by mortgage on the Brunswick and Chillicothe railroad, amounting to $9,135.

On the first days of March and September (or as soon thereafter as practicable), the semi-annual interest, at seven per cent. per annum, then due on three thousand (3,000) bonds of one thousand dollars each, issued in September, 1874, and secured by mortgage on the St. Louis, Kansas City and Northern railroad, amounting to the sum of $105,000.

On the first days of September, October, and November (or as soon thereafter as practicable), the interest, at six per cent. per annum, then due on the sum of $522,975.50, on what are known as graduated scrip certificates, issued in 1877, secured by mortgage on the Wabash railway, amounting to $11,059.51.

On the first days of September, October, and November (or
118 as soon thereafter as practicable), the interest, at seven per cent. per annum, then due on the sum of $115,385, in certificates of indebtedness issued in 1877, and secured by mortgage on the Wabash railway, amounting to $2,692.31.

On the first days of April and October (or as soon thereafter as practicable), the semi-annual interest, at seven per cent. per annum, then due on two thousand (2,000) bonds of one thousand dollars each, issued in May, 1870, and secured by mortgage on the Wabash railway, amounting to $70,000.

The semi-annual interest, at six per cent. per annum, then due on one thousand (1,000) bonds of one thousand dollars each, issued in 1878 and secured by mortgage on the St. Charles bridge, amounting to $30,000.00.

The semi-annual interest, at seven per cent. per annum, then due on seven hundred and seventy-seven (777) bonds of five hundred dollars each, issued in 1878 and secured by mortgage on the St. Charles bridge, amounting — $13,597.50.

The semi-annual interest, at seven per cent. per annum, then due on six hundred and forty-five (645) bonds of five hundred dollars each, issued in 1875 and secured by mortgage on St. Louis, Ottumwa and Cedar Rapids railway, amounting to $11,287.50.

The semi-annual interest, at seven per cent. per annum, then due on twenty-three hundred and fifty (2,350) bonds of one thousand dollars each, issued in February, 1879, and secured by mortgage on the Omaha division of the St. Louis, Kansas City and Northern railway, amounting to $82,250.

On the first days of May and November (or as soon thereafter as practicable), the semi-annual interest, at seven per cent. per
119 annum, then due on five hundred (500) bonds of one thousand dollars each, issued in 1865 and secured by mortgage on the Quincy and Toledo railroad, amounting to $17,500.00.

The semi-annual interest, at seven per cent. per annum, then due on one thousand (1,000) bonds of one thousand dollars each, issued

in September, 1853, and secured by mortgage on the Toledo and Wabash railroad, amounting to $35,000.00.

The semi-annual interest, at seven per cent. per annum, then due on fifteen hundred (1,500) bonds of one thousand dollars each, issued in 1858 and secured by mortgage on the Wabash and Western railroad, amounting to $52,500.00.

The semi-annual interest, at seven per cent. per annum, then due on twenty-five hundred (2,500) bonds of one thousand dollars each, issued in May, 1865, and secured by mortgage on the Great Western railroad of 1859, amounting to $87,500.00.

The semi-annual interest, at seven per cent. per annum, then due on one hundred (100) bonds of one thousand dollars each, issued in May, 1873, and secured by mortgage on the Boone County and Boonville railroad, amounting to $3,500.00.

On the first days of June and December (or as soon thereafter as practicable), the semi-annual interest, at seven per cent. per annum, then due on five hundred (500) bonds of one thousand dollars each, issued in May, 1879, and secured by mortgage on the Hannibal and Naples railroad, amounting to $17,500.00.

2d. It is further ordered that, until otherwise directed, the
120 receivers herein, from the incoming rents and profits of said property, after meeting such other obligations as they have been directed to discharge by the former orders of this court, pay from whatever balance may remain in their hands the semi-annual interest, at the rate of five per cent. per annum, as the same from time to time falls due, on the first days of January and July in each year (or as soon thereafter as practicable), upon the forty-five hundred (4,500) bonds, issued in 1880, secured by mortgage on what is known as the Chicago division of said railway, and amounting to $112,500.

3d. And it is further ordered that the receivers herein, until otherwise directed, keep the accounts of all the earnings and incomes from, as well as the accounts of all the operating expenses, cost of maintenance, and taxes upon, the following lines or divisions of said property separately, to wit:

1. The Detroit, Butler and St. Louis railroad, which extends from Butler, in the State of Indiana, to Detroit Junction, in the State of Michigan.

2. The Eel River railroad, which extends from Logansport to Butler, in the State of Iowa.

3. The Quincy, Missouri and Pacific railroad, commencing at West Quincy and extending to Trenton, in the State of Missouri.

4. The Indianapolis, Peru and Chicago railroad, extending from the city of Indianapolis to Michigan City, in the State of Indiana.

5. The Toledo, Peoria and Western railroad, extending from the State line between the States of Indiana and Illinois to the cities of Hamilton and Warsaw, in the State of Illinois, and Burlington, in the State of Iowa.

121 6. The Havana, Rantoul and Eastern railroad, extending from Williamsport, in the State of Indiana, to Leroy, in the State of Illinois.

7. The Centerville, Moravia and Albia railroad, extending from Centerville to Albia, in the State of Iowa.

8. The Cairo division, extending from Danville to Cairo, in the State of Illinois.

9. The Champaign, Havana and Western railroad, extending from Urbana to Havana, in the State of Illinois.

10. The Iowa division, extending from Keokuk to Humeston, in the State of Iowa.

And that said receivers make quarterly reports thereof, showing not only the income and expenses of each of the lines aforesaid, but also the methods by which the incomes and expenses of said lines were respectively ascertained.

EDMUND T. ALLEN,
Special Master.

Report confirmed.

On the 20th day of September, 1884, the said receivers filed in said cause in said court the following petition:

122 In the Circuit Court of the United States for the Eastern District of Missouri, September Term, A. D. 1884.

THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, Complainant,
against
THE CENTRAL TRUST COMPANY OF NEW YORK, JAMES CHENEY, The Mercantile Trust Company of New York, and Others, Defendants.

SOLON HUMPHREYS and THOMAS E. TUTT, Receivers.

Petition of Receivers for Instructions as to Interest Due on Bonds of the Havana, Champaign and Western Division. Filed September 20, 1884.

Now come Solon Humphreys and Thomas E. Tutt, receivers of the Wabash, St. Louis and Pacific railway, and respectfully state and show unto the court that heretofore, to wit, on the 31st day of March, 1880, the Champaign, Havana and Western Railway
123 Company, a corporation organized and existing under the laws of the State of Illinois and owning a railroad wholly within said State, commencing at the city of Champaign, in the county of Champaign, and extending from thence to the town of White Heath, in the county of Piatt, and from thence by way of Clinton, in the county of De Witt; Lincoln, in the county of Logan; Macon City, in the county of Macon, to Havana, in said Macon county, together with a branch commencing at said town of White Heath, and extending from thence through Monticello, in said county of Piatt, to the city of Macon, in the county of Macon, and being altogether about one hundred and thirty-one (131) miles, more or less, in length, was, together with all its other property and franchises, duly and in all respects according to the laws of the State of Illinois consolidated with the Wabash, St. Louis and Pacific

Railway Company, and thereupon the same became from thenceforth a part of the system of railroads owned and (until the appointment of your petitioners as receivers herein) operated by said Wabash, St. Louis and Pacific Railway Company; that afterwards, to wit, on the 1st day of December, 1880, the said Wabash, St. Louis and Pacific Railway Company, by its deed of that date, conveyed to Henry F. Spaulding and John T. Terry all the railroad above described, together with all its appurtenances, in trust to secure the payment of the principal and interest of one thousand six hundred bonds of one thousand dollars each, dated on the said 1st day of December, 1880, payable thirty years after date, with interest at the rate of six per cent. per annum, payable semi-annually on the first days of June and December in each year; but your petitioners state, upon information and belief, that only one thousand two hundred and ten of the aforesaid bonds have been issued.

Your petitioners further show that previously, to wit, on the
124 first day of July, 1879, the said Champaign, Havana and Western Railway Company had executed its deed of trust to Henry W. Ford and Richard S. Brock, conveying to them in trust the entire railway and property above described to secure the payment of the principal and interest of three hundred and fifty thousand dollars ($350,000.00) in the "first-mortgage preferred bonds" of said company, bearing date on the said first day of July, 1879, and one million one hundred thousand dollars in what are known as the "first-mortgage common bonds" of said company, which said "first-mortgage preferred bonds" fall due thirty years after date and bear interest at the rate of seven per cent. per annum, payable semi-annually on the first days of January and July in each year.

And your petitioners state upon information and belief that the above-mentioned "first-mortgage preferred bonds," to the amount of three hundred and fifty thousand dollars ($350,000.00), is all the indebtedness of said Champaign, Havana and Western Railway Company now outstanding and secured by said mortgage of July 1st, 1879, thereby making the total indebtedness now secured by the two mortgages aforesaid on the lines of said Champaign, Havana and Western railway, as above described, one million five hundred and sixty thousand dollars, of which sum one million two hundred and ten thousand dollars bears interest at the rate of six per cent. and three hundred and fifty thousand dollars thereof bears interest at the rate of seven per cent., making the total interest annually due on said indebtedness the sum of ninety-seven thousand one hundred dollars ($97,100.00), of which sum twelve thousand two hundred and fifty dollars ($12,250.00) falls due on the first day of January; thirty-six thousand three hundred dollars ($36,300.00) falls due on the first day of June; twelve thousand two hundred and fifty dollars ($12,250.00) on the first day of July, and the
125 sum of thirty-six thousand three hundred dollars ($36,300.00) on the first day of December in each year.

Your petitioners further state that on or about the 1st day of June, 1880, the said Wabash, St. Louis and Pacific Railway Company executed its bonds in the sum of fifty million dollars

($50,000,000.00), falling due on the 1st day of June, 1920, with interest from date at the rate of six per cent. per annum, payable semi-annually on the first days of June and December in each year, which bonds are known as the "general mortgage bonds" of said Wabash, St. Louis and Pacific Railway Company, and that to secure the payment of the principal and interest thereof said Wabash, St. Louis and Pacific Railway Company, on said first day of June, 1880, executed and delivered to the Central Trust Company of New York and James Cheney, of the State of Indiana, a certain indenture of mortgage, known as the "general mortgage," wherein it conveyed to said trustees for the purposes aforesaid all of the railroad hereinbefore described, together with its interest in all the other lines of railroad owned or operated by it in the States of Missouri, Iowa, Illinois, Indiana, Ohio, and Michigan; but your petitioners state that they are informed and believe that the lien of the mortgage last aforesaid is inferior to the lien of the aforesaid conveyance executed July 1st, 1879, by said Champaign, Havana and Western Railway Company to Ford and Brock as trustees, and also inferior to the lien of the aforesaid conveyance executed December 1st, 1880, by said Wabash, St. Louis and Pacific Railway Company to Henry F. Spaulding and John T. Terry, trustees as aforesaid.

Your petitioners further state that they are informed and believe that of the aforesaid fifty thousand "general mortgage bonds"
126 only seventeen thousand thereof issued are now outstanding and secured by the "general mortgage" aforesaid.

Your petitioners further state that on the first day of June, 1884, both the said Wabash, St. Louis and Pacific Railway Company and your petitioners, as the receivers of all its property and income, failed and neglected to pay the semi-annual interest, amounting to $36,300.00, then due on the aforesaid one thousand two hundred and ten bonds so issued by said Wabash, St. Louis and Pacific Railway Company on the first day of December, 1880, and that said interest has not yet been paid; and, furthermore, that on the first day of July, 1884, the said Wabash, St. Louis and Pacific Railway Company, as well as your petitioners, as receivers of all its property and income, also failed and neglected to pay the semi-annual interest, amounting to $12,250.00, then due on the said $350,000.00 of the bonds of said Champaign, Havana and Western Railway Company, issued on the first day of July, 1879, and that said interest has not yet been paid.

Your petitioners further state that they are informed and believe that said "Champaign, Havana and Western railway" is worth much more than the amount of the aforesaid mortgage debts of $350,000.00 and $1,210,000.00, and that under ordinary circumstances, with proper and skilful management, with average crops and business upon and along the line thereof, said road would annually earn a sum sufficient to pay all its operating expenses, the cost of maintenance, the interest on the two series of mortgage bonds last aforesaid, and leave a considerable surplus to be applied to the payment of interest upon the "general mortgage bonds" of said company; and your petitioners further state that the revenue de-

rived from business originating along the line of said
127 "Champaign, Havana and Western railway" and brought by it to the main line of said Wabash, St. Louis and Pacific railway and delivered to it for transportation will contribute largely to the income of said main line and to the raising of sufficient revenue for the payment of interest on said "general mortgage bonds" and other debts of said company.

Your petitioners further state that they are informed and believe that owing to a partial failure of the crops for the past three years in the section of country through which said railway is constructed the business and income of said railroad have been reduced far below what might, with reasonable certainty, be expected in all ordinary seasons.

Your petitioners further state that to put said road in good order and render it in all respects suitable and safe for the transaction of business the said Wabash, St. Louis and Pacific Railway Company did, after its acquisition thereof, expend large sums of money in permanently improving and bettering its condition; and your petitioners further state that they are informed and believe that the crops along the line of said railway for the present year, now fully matured, are such as to reasonably and fairly induce and warrant a belief that during the next twelve months the income from the business of said road will be increased nearly, if not quite, one hundred per cent. over what it has been during any one of the three years last past.

Wherefore, considering the large sums of money heretofore spent by said Wabash, St. Louis and Pacific Railway Company in permanently improving the condition of said property, that manifestly there is soon to be a large increase in the business of said line, and that the earnings thereof will in the immediate future
128 & 129 not only be sufficient to pay the cost of maintaining and operating the same and interest on said first and second mortgage bonds, but that there will, as your petitioners believe, be a large surplus that can be applied from time to time to the payment of interest on said "general mortgage bonds" or to the payment of the other indebtedness of said company, all of which will render said line of great value to the said Wabash, St. Louis and Pacific Railway Company, as well as to all the creditors thereof, your petitioners therefore pray for the advice and directions of the court in the premises, and that your honors make such order concerning the payment of interest now due and to become due on the aforesaid "first" and "second" mortgage bonds as to your honors shall seem meet.

SOLON HUMPHREYS,
THOS. E. TUTT, *Receivers.*

On the 15th day of October, 1884, the said court in said cause rendered the following opinion on said last-mentioned petition:

130 In the Circuit Court of the United States for the Eastern District of Missouri.

THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, Complainant,
against
THE CENTRAL TRUST COMPANY OF NEW YORK, JAMES Cheney, The Mercantile Trust Company of New York, and Others, Defendants. } No. 2357.

Remarks of Treat, J. (Orally), on Havana Division Bonds, October 15, 1884.

Mr. SMITH: I presented on yesterday the report of the master on the petition of the receivers for instructions as to the bonds of the Havana division of the Wabash road, and your honor suggested that it should be brought up again this morning. I am ready to present it if your honor is ready to hear it.

(The petition was then read.)

131 The COURT: I stated at an early day, and Judge Brewer has gone over that matter (and we are in accord with regard to it), that I am not going to take the money that belongs to the underlying mortgages to pay interest on non-earning branches. If they have got to fail they must fail. I will protect the underlying mortgages especially, and they haven't got enough here to do it.

Mr. SMITH: Your honor remembers these are underlying mortgages on this line.

The COURT: No; not if I understand the petition. They have chosen unwisely, it may be, with the exception of a few, to take general-mortgage bonds. There are a few underlying.

Mr. SMITH: I will re-read that portion of the petition.

(Petition re-read.)

The COURT: I understand all that. Now what? If the bondholders of the Havana division are prior in right to the general mortgage and it is not earning enough, why should the other concerns have their money taken to pay a non-paying concern? That is the question that presses on the mind of the court.

Mr. SMITH: The main reason is a portion of this road they cannot do without; otherwise they must abandon what is one of the most profitable feeders of the road.

The COURT: And, therefore, to get 12 miles you are going to take 131 and meet these obligations. I cannot grant any such request. We will call a halt on these matters. They say "prospectively" they will do something. Well, "prospectively" it was to be a grand enterprise. It turns out to be a failure. Now, the money
132 that belongs honestly and fairly to one set of men cannot be taken and be applied to another set. Let them go on and foreclose the mortgage.

Mr. SMITH: I suggest the testimony may show——

The COURT: "Prospectively"?

Mr. SMITH: No; I mean as to the actual earnings during the past month or two, and that might aid your honor to reach a proper conclusion.

The COURT: In one case I did it, and that was on the Eel River division, and I will never do it again.

Mr. SMITH: The receivers state in the petition filed almost a month ago that they are earning a larger sum of money than is necessary to pay the expenses.

The COURT: I will not authorize receivers' certificates (and so said Judge Brewer, and I am fully in accord with him), whereby, prior to all obligations, the court obligations are to be issued for parties and have them subordinate other obligations. This is a case of that kind. I will not authorize the receivers, unless they get it out of the earnings of this concern, to pay these matters and issue certificates that override all of these various superior rights. I cannot do it; and then, again, let me remark, in regard to these matters, Mr. Smith, I am sorry you have not printed Judge Brewer's remarks, because they are so fully in accord with my views, to wit: These receivers come in and say "prospectively" they will do a great many things; "prospectively," when under this cross-bill that has been filed, if this mortgage is foreclosed that is the end of it. They must not suppose that prospectively under the orders of this court they are going to run this system of railroads indefi-
133 nitely. Courts are created for no such purpose, and will not tolerate anything that will keep property in its hands indefinitely. Therefore when the receiver comes in and says "prospectively" he may make something in the course of two or three years the court will pay no attention to it. I want to know the funds that are in his hands that I may require him to administer them, not upon the theory that the court is going to run this railroad an indefinite number of years.

Mr. SMITH: Then I ask that the matter be re-referred to the master, and we will introduce testimony showing the actual earnings of the road in the past three months.

The COURT: That is the important element. If this branch is earning enough to pay its own interest, that is another inquiry; but certainly I am not going to sit here and order that the earnings that belong to other branches in this consolidated system shall be taken to pay concerns that do not earn running expenses. Let them collapse.

Mr. SMITH: Your honor will bear in mind that this is an important link in the Chicago division, and, as the master says, is entitled to more credit.

The COURT: Yes, 12 miles, and you want to acquire 131 miles, involving a liability of the payment of interest on about two and one-half millions of dollars, when, so far as the court knows, it is not paying operating expenses. As the case stands before me I shall refuse the order, and I want it distinctly understood, as you are of counsel for the receivers, that they are to operate the road upon the theory that this mortgage is to be foreclosed just as soon as in the ordinary course of administration under the rules in equity

it can be done, and they must not project their schemes beyond that limited time. When they come in on the theory that the
134&135 court will keep possession of this road for an indefinite period of time and undertake to operate the road with respect to prospective profits, the court will pay no attention to anything of the kind. In the ordinary course of administration I propose, if you get the parties in here to foreclose at the March term, to have done with it, and if they want to enter into obligations and operations extending beyond that period the court will pay no attention to it. Let the parties in interest, bondholders and others, attend to that class of questions. The court is not going to run the road for the benefit of anybody except the parties who have legal rights.

Mr. SMITH: I will ask that the petition be re-referred to the master for the purpose of allowing the receiver to introduce additional testimony.

The COURT: You may refer it to him for further testimony, but recollect you have the idea of the court.

Mr. SMITH: I do.

The COURT: And I am very glad Judge Brewer has stated it quite as forcibly as I have done, and we mean what we say; at least I do, as far as I am concerned. I have been fighting this for a series of years, and I am glad that I am supported by Judge Brewer and Justice Miller. We are all in accord.

136 On the 14th day of October, 1884, there was filed in said cause No. 2357, by leave of court, the amended cross-bill of said Central Trust Company of New York and James Cheney, trustees, praying substantially the relief asked in their cross-bill filed on the 9th day of June, 1884.

On the 13th day of January, 1885, the said Central Trust Company of New York and James Cheney, trustees, filed in the circuit court of the city of St. Louis, State of Missouri, their bill against said Wabash, St. Louis and Pacific Railway Company and others, defendants, praying substantially for the relief prayed for in their cross-bill filed as aforesaid in said United States circuit court on the 9th day of June, 1884; and on the 10th day of June, 1885, said petition filed in said circuit court, city of St. Louis, was, on motion, removed to said United States circuit court and became cause No. 2464 in said last-mentioned court.

And on the 19th day of March, 1885, by order of said court, said causes Nos. 2357 and 2464 were consolidated.

Under order of said court in said cause of date June 28th, 1884, said receivers made the following reports of the earnings and expenses of the Quincy, Missouri and Pacific Railway Company:

Report of Receivers under Order of June 28, '84.

Report of receivers under order of June 28th, 1884, with respect to keeping reparately the aecounts of earnings and expenses of certain lines.

Now come Solon Humphreys and Thomas E. Tutt, receivers in the above-entitled cause, and in pursuance of the order of this honorable court made on the 28th day of June, 1884, directing, among other thiugs, that, until otherwise ordered, they keep the ac-
137 counts of all earnings and incomes, as well as of the operating expenses, cost of maintenance, and taxes upon certain lines and divisions of said railroad in said order described, separately, and that they make quarterly reports thereof showing not only the income and expenses of each of said lines, but also the methods by which the incomes and expenses of said lines were respectively ascertained, they beg leave to report as follows:

* * * * * * *

Quincy, Missouri and Pacific railroad.

That the earnings and incomes from, as well as the operating expenses, cost of maintenance, and taxes of the Quincy, Missouri and Pacific railroad, which extends from West Quincy to Trenton, in the State of Missouri, a distance of 134 miles, have been, for the same period, as follows:

Earnings.

Freight	$34,149 35	
Passengers	20,625 42	
Mails	3,173 01	
Express	1,100 00	
Miscellaneous	489 55	
		$59,537 33
Pool earnings		10 15
		$59,547 48

Expenses.

Operating expenses, ordinary	$55,188 82	
" " extraordinary	468 24	
Taxes, estimated	5,307 20	
		60,964 26
Deficit		1,416 78

That we have ascertained the earnings and incomes of said line in the following manner:

Upon all through freight traffic between St. Louis and stations on the Quincy, Missouri and Pacific railroad, fifty per cent. of the through earnings were assigned to the Quincy, Missouri and Pacific railroad.

Upon all through freight traffic between Chicago and stations on the Quincy, Missouri and Pacific railroad, fifty per cent. of the through earnings were assigned to the Quincy, Missouri and Pacific railroad.

138 Upon all through freight traffic between Detroit, Toledo, Defiance, Defiance Junction, Fort Wayne, New Haven, and stations on the Quincy, Missouri and Pacific railroad, forty-four per cent. of the through earnings were assigned to the Quincy, Missouri and Pacific railroad.

Between all stations east of the Mississippi river and stations on the Quincy, Missouri and Pacific railroad the through freight earnings were divided upon a mileage basis, allowing the Quincy, Missouri and Pacific railroad in all cases a minimum haul of sixty miles.

On all freight traffic to and from points beyond the Quincy, Missouri and Pacific railroad in which the Quincy, Missouri and Pacific railroad forms the intermediate railroad, the through earnings were divided on a mileage *pro rata*, allowing the Quincy, Missouri and Pacific railroad an increase of ten per cent. over its actual mileage, the Quincy bridge toll being deducted before the division of its earnings.

On all freight between stations west of the Mississippi river and stations on the Quincy, Missouri and Pacific railroad, including Missouri river points, the through earnings were divided upon a mileage *pro rata*, the Quincy, Missouri and Pacific railroad being allowed a constructive mileage of twenty per cent. over its actual distance.

Upon all local freight traffic the entire earnings were assigned to the Quincy, Missouri and Pacific railroad.

Upon all through passenger traffic passing between station- on the Quincy, Missouri and Pacific railroad and stations on other lines and branches of the Wabash, St. Louis and Pacific railway, or upon any through passenger traffic passing over the Quincy, Missouri and Pacific railroad in which said railroad forms the intermediate line, the earnings were divided upon a mileage *pro rata*.

139 Upon all local passenger traffic the entire earnings were assigned to the Quincy, Missouri, and Pacific railroad.

In ascertaining the earnings for mail service the Quincy, Missouri and Pacific railroad has been assigned the total amount allowed by the Government for the service.

In ascertaining the express earnings the Quincy, Missouri and Pacific railroad has been assigned the full amount received for that service from the Pacific Express Company.

The item of $489.55 of miscellaneous earnings represents all revenue received from other miscellaneous sources on that line.

The item of pool earnings represents a net balance received on account of the pooling of the freight traffic of the line from competitive points.

Expenses.

And your receivers further beg leave to report that the operating

and other expenses of all the lines aforesaid have been ascertained in the manner following, to wit:

All expenses for maintaining roadway and tracks, bridges and buildings, all station and train and other expenses which are local have been charged to the line upon which the expense was incurred.

Advertising, salaries, and expenses of soliciting and traveling agents, salaries and expenses of general officers, salaries of clerks in general offices, insurance and all general expenses common to the entire line have been distributed to the lines and branches upon the basis of earnings.

Expenses for repairing and maintaining cars have been distributed to the lines and branches upon the basis of mileage of cars over the respective lines.

Repairs and maintenance of locomotives, repairs of engine-
140 houses and machine shops, expenses and repairs of fuel stations, expenses and repairs of water stations, salaries and expenses of officers in charge of motive power, repairs of tools and machinery have been distributed to the lines and branches upon an engine-mileage basis.

Taxes have been estimated and charged to each division on a basis of former assessments of same property.

Each road has been charged with track and bridge rentals local to the line.

Pool balances represent a net balance charged on account of the pooling of the freight traffic of the line from competitive points.

All of which is respectfully submitted to your honors.

Jan. 8, '85.

SOLON HUMPHREYS,
By T. E. TUTT,
THOS. E. TUTT, *Receivers.*

Report of Receivers under Order of June 28, '84.

Report of receivers under order of June 28th, 1884, with respect to keeping separately the accounts of earnings and expenses of certain lines.

Now comes Solon Humphreys and Thomas E. Tutt, receivers in the above-entitled cause, and in pursuance of the order of this honorable court, made on the 28th day of June, 1884, directing, among other things, that, until otherwise ordered, they keep accounts of all earnings and incomes, as well as of the operating expenses, cost of maintenance, and taxes, upon certain lines and divisions of said railroad in said order described, separately, and that they make quarterly reports thereof, showing not only the income and expenses of each of said lines, but also the methods by which the incomes and expenses of said lines were respectively ascertained, they beg leave to report as follows:

* * * * * * *

Quincy, Missouri and Pacific railroad.

141 That the earnings and incomes from as well as the operating expenses, cost of maintenance, and taxes of the Quincy, Missouri and Pacific railroad, which extends from West Quincy to Trenton, in the State of Missouri, a distance of 134 miles, have been for the same period as follows:

Earnings.

Freight	$28,374 77	
Passengers	12,401 97	
Mails	2,323 55	
Express	825 00	
Miscellaneous	338 83	
		$44,264 12
Pool earnings		27 08
		$44,291 20

Expenses.

Operating expenses, ordinary	$47,811 41	
" " extraordinary	523 37	
Interest, New York and Pacific Car Trust Ass'n	997 84	
Taxes, estimated	3,980 40	
		$53,313 02
Deficit Oct. 1 to December 31, 1884		9,021 82
Deficit May 29 to Sept. 30, 1884, as per last report		1,416 78
Total deficit May 29 to December 31, 1884		$10,438 60

The earnings, income, and expenses of each of the foregoing branches have been ascertain- and apportioned in the manner fully set forth in our former report, filed herein, for the period covering May 29 and September 30, 1884.

All of which is respectfully submitted to your honors.

March 2, 1885.

Report of Receivers under Order of June 28, '84.

Report of receivers under order of June 28th, 1884, with respect to keeping separately the accounts of earnings and expenses of certain lines.

Now come Solon Humphreys and Thomas E. Tutt, receivers in the above-entitled cause, and in pursuance of the order of this honorable court, made on the 28th day of June, 1884, directing, among other things, that, until otherwise ordered, they keep the accounts of all earning and incomes, as well as of the operating expenses,
142 cost of maintenance, and taxes, upon certain lines and divisions of said railroad in said order described, separately, and that they make quarterly reports thereof, showing not only

the income and expenses of each of said lines, but also the methods by which the incomes and expenses of said lines were respectively ascertained, they beg leave to report as follows:

* * * * * * *

Quincy, Missouri and Pacific railroad.

That the earnings and incomes from as well as the operating expenses, cost of maintenance, and taxes of the Quincy, Missouri and Pacific railroad, which extends from West Quincy to Trenton, in the State of Missouri, a distance of 134 miles, have been for the same period as follows:

Gross earnings for 3 months, December 1st, 1884, to February 28th, 1885, inclusive		$40,499 29	
Other credits		62 53	
		$40,561 82	
Operating expenses, same period	$45,770 07		
Other debits (including 3 mos. taxes)	4,397 42		
Proportion of car-trust interest	443 49		
		$50,610 98	
Excess of expenses over earnings			$10,049 16
Gross earnings and other credits for six months, May 29 to November 30th, 1884, as previously reported		$88,346 01	
Operating expenses and fixed charges (not including rental) for same period		98,547 94	
Excess of expenses over earnings			$10,201 93
Excess of expenses over earnings for 9 months (not including any charge for rental)			$20,251 09

All of which is respectfully submitted to your honors.
May 15th, 1885.

Report of Receivers under Order of June 28, '84.

Report of receivers under order of June 28, 1884, with respect to keeping separately the accounts of earnings and expenses of certain lines.

Now come Solon Humphreys and Thomas E. Tutt, receivers in the above-entitled cause, and in pursuance of the order of this honorable court, made on the 28th day of June, 1884, directing, among other things, that, until otherwise ordered, they keep the accounts of all earnings and incomes, as well as of the operating expenses, cost of maintenance, and taxes, upon certain lines
143 and divisions of said railroad in said order described, separately, and that they make quarterly reports thereof, show-

ing not only the income and expenses of each of said lines, but also the methods by which the income and expenses of said lines were respectively ascertained, they beg leave to report as follows:

* * * * * * *

Quincy, Missouri and Pacific railroad.

That the earnings and incomes from as well as the operating expenses, cost of maintenance, and taxes of the Quincy, Missouri, and Pacific railroad, which extends from West Quincy to Trenton, in the State of Missouri, a distance of 134 miles, have been for the same period as follows:

Gross earnings for 3 months, March 1st to May 31st, 1885, inclusive		$43,480 27	
Operating expenses, same period	39,065 12		
Other debits (including 3 mos. taxes)	4,255 00		
Proportion of car-trust int.	459 87		
		$43,779 99	
Excess of expenses over earnings			$299 72
Gross earnings, May 29, 1884, to Feb'y 28, 1885, as previously reported		$128,907 83	
Operating expenses and fixed charges (not including rental) for same period		149,158 92	
Excess of expenses over earnings			20,251 09
Excess of expenses over earnings, May 29th, 1884, to May 31st, 1885, inclusive (not including any charge for rental)			$20,550 81

* * * * * * *

All of which is respectfully submitted to your honors.
August 15, 1885.

SOLON HUMPHREYS,
THOMAS E. TUTT,
Receivers.

Filed August 18th, 1885.
Confirmed October 10th, 1887.

On March 20th, 1885, the said receivers filed in said cause
144 in said court the following petition:

Petition of Receivers. Filed March 20, '85.

March Term, A. D. 1885.

Now come Solon Humphreys and Thomas E. Tutt, receivers of the Wabash, St. Louis and Pacific Railway Company, and respectfully state and show unto your honors that since they took possession of the system of railroads previously operated by the Wabash

St. Louis and Pacific Railway Company the earnings of many of the branch and leased lines thereof have not been sufficient to pay the operating expenses, interest on their mortgage bonds, and the rentals contracted to be paid by the Wabash, St. Louis and Pacific Railway Company in the several contracts and leases under which said lines were acquired.

Your receivers further state that the operating expenses of a number of said roads have since the receivership greatly exceeded their earnings, and they herewith submit unto your honors a statements showing in detail the earnings and operating expenses of all the branch and leased lines of said system from May 29th to November 30th, 1884.

That your honors may, in this connection, be informed of the relation sustained by the several branch and leased lines aforesaid to the remainder of the system, your receivers respectfully state:

1st. That the "Wabash, St. Louis and Pacific Railway Company" was organized November 10th, 1879, by a consolidation of the stock, property, and franchises of the "Wabash Railway Company" with the stock, property, and franchises of the "St. Louis, Kansas City and Northern Railway Company."

2nd. That prior to said consolidation the "Wabash Railway Company" owned lines of railroad extending westwardly from Toledo, Ohio, through the States of Ohio and Indiana to De-
145 catur, Illinois; from Decatur to East St. Louis; from Decatur to Meredosia and Naples; from Naples to East Hannibal; from Meredosia, via Clayton, to Camp Point; from Clayton to Elvaston, and from Edwardsville to Edwardsville Crossing, the aggregate length of said lines being six hundred and fifty-two (652) miles.

3rd. That prior to said consolidation the "St. Louis, Kansas City and Northern Railway Company" owned lines of railroad in the State of Missouri extending from the union depot, in the city of St. Louis, to Ferguson, in the county of St. Louis; from Carr and Second streets, in said city, via Ferguson, to Moberly; from Moberly north to the Iowa State line; from Moberly west to Kansas City; from Salisbury to Glasgow and the bridge over the Missouri river at St. Charles, the aggregate length of said lines being three hundred and eighty-eight (388) miles.

4th. That the consolidated company thereupon became the owner (subject to the several mortgages fully described in the bill) of all the lines of railroad above described, and your receivers state that the earnings thereof for the period commencing May 29th and ending November 30th, 1884, were sufficient to pay their operating expenses and interest on all the bonds issued before the date of said consolidation and secured by mortgage on said lines.

5th. Your receivers further state that the several branch and leased lines of said system were, to the best of their knowledge and belief, acquired at the dates, in the manner, and upon the terms following, to wit:

(Here follows a statement in detail of the dates and terms on

which the various branch lines were acquired by the Wabash Co., and as to the Q., M. & P. it contained the following:)

Quincy, Missouri and Pacific Railway.

On the 21st day of August, 1879, the Quincy, Missouri &
146 Pacific Railway Company leased to the Wabash Railway Company for a term of ninety-nine years its lines of railway extending from West Quincy to Trenton, Missouri, a distance of one hundred and thirty-four miles (the road was only completed to Novinger, in Adair county, at the date of the lease, but under its provisions the line was extended to Trenton), at an absolute annual rental, payable on the first days of January and July, equal to the interest, at six per cent., on the bonds of the Quincy, Missouri & Pacific railway to the amount of nine thousand dollars for each mile of said railroad, of which there are now outstanding $1,204,000.

The lease further provides that whenever the gross receipts of said road shall be six hundred thousand dollars or more per annum, thirty per cent. thereof shall be set apart for the payment of said interest and the balance of said thirty per cent. distributed as dividends on stock; that whenever the gross receipts shall be less than six hundred thousand dollars per annum and not less than four hundred thousand dollars, twenty-five per cent. thereof shall be set apart and distributed as aforesaid, and that when the gross receipts shall be less than four hundred thousand dollars per annum, twenty per cent. thereof shall be set apart and distributed as aforesaid.

For the period commencing May 29th and ending November 30th, 1884, the earnings and expenses of said line have, under the receivership, been as follows:

Gross earnings	$88,325 31	
Other credits	20 70	
		$88,346 01
Operating expenses	$88,890 23	
Other debits (including six months' taxes)	8,802 42	
Proportion of car-trust interest	855 29	
Rental (six months' interest)	36,120 00	
		$134,667 94
		$46,321 93

The expenses of this line (not including any charge for rental) have therefore exceeded its earnings $10,201.93.

147 Your receivers therefore pray your honors to make such orders with respect to the future operation of said lines and concerning the payment of the respective rentals agreed to be paid by said Wabash, St. Louis & Pacific Railway Company in the several leases and agreements aforesaid as to your honors shall seem meet.

SOLON HUMPHREYS,
THOMAS E. TUTT,
Receivers.

WELLS H. BLODGETT, *Solicitor.*

Notice that the foregoing petition had been filed in said cause, and that the same would be heard on April 14th, 1884, was by order of said court duly served upon the solicitors of intervenors.

Or the 16th day of April, 1885, the following order was entered in said cause by said court:

148 In the Circuit Court of the United States for the Eastern District of Missouri, March Term, 1885.

CENTRAL TRUST CO. OF NEW YORK *et al.* *vs.* THE WABASH, ST. LOUIS AND PACIFIC RAILWAY CO. *et al.* and WABASH, ST. LOUIS AND PACIFIC RAILWAY CO. *vs.* THE CENTRAL TRUST CO. OF NEW YORK *et al.*	Nos. 2357 and 2464. Consolidated Cause.

In the matter of the application of the receivers for the cancellation of certain leases.

Now, at this day, the report of Solon Humphreys and Thomas E. Tutt, receivers of the Wabash, St. Louis and Pacific Railway Company, filed herein on the 20th day of March, 1885, showing to this court, among other matters, the earnings and expenses of the
148*a* leased and branch lines of said Wabash, St. Louis and Pacific railway for the period commencing on the 29th day of May and ending on the 30th day of November, A. D. 1884, and praying for orders with respect to the future operation of said lines and concerning the payment of interest and the respective rentals agreed to be paid by said Wabash, St. Louis and Pacific Railway Company in the several leases and agreements in said report set forth, coming on to be heard, pursuant to the order of court theretofore made on notice given, the court gave the following opinion thereon:

BREWER, *J.* (orally):

Several questions have been presented to us the last few days concerning which we have come to a conclusion, and perhaps we had better dispose of those before proceeding with the hearing of other matters.

I might preface what I have to say in reference to the legal questions involved with the remark that this court is in very much the condition of that successful but unfortunate holder of a lottery ticket to whom the first prize of an elephant was awarded. The prize was vast and valuable, but the ever-recurring conundrum was what to do with it. And this Wabash road comes to us with ever-recurring and difficult questions.

In reference to the Cairo division, in which an order was presented to us day before yesterday, we have passed that order, with this addition:

"And it is further ordered that the receivers appear to said cause

pending in said circuit court for the southern district of Illinois and present any demand that they may have, as said receivers, against said property known as the Cairo division for operating or other expenses, and also for the proportion of the receivers' certifi-
148b cates issued under the orders of this court for which said property may be justly chargeable in law or in equity."

That is, we pass it, with the idea that while jurisdiction is retained in this court for ultimate orders it is better that that court, in the first instance, pass on the amount of receivers' certificates or operating expenses justly chargeable to the Cairo division and include such amount in the foreclosure decree which shall be entered.

Mr. GREEN: I think a blank was left at the time when the surrender should be made. That might be filled up by inserting the words "ten days."

Mr. TAUSSIG: We prefer that should be a matter of consultation. There are two blanks—one in reference to the present surrender and the other in reference to the rolling stock.

TREAT, J.: The first blank is the time the receivers shall turn over the road to the trustees. How long a time do you wish for that?

Mr. GREEN: Ten days.

TREAT, J.: Now, in reference to the rolling stock, which, I suppose, is scattered all over the country.

Mr. GREEN: Say sixty days. I think that will be satisfactory.

TREAT, J.: It cannot be very well done before that. The cars belonging to this division may be scattered from one end of the country to the other, and will have to be brought in.

148c Mr. GREEN: Of course we will surrender all we have now at once.

Mr. ——: I understand that the rolling stock is not to be taken off the road; in other words, that we are not to be left entirely without rolling stock.

Mr. GREEN: Oh, certainly not.

Mr. TAUSSIG: We will fill the blank after consultation.

BREWER, *J.* (orally):

Now, recurring to the general questions that are presented, we name some half dozen matters which we think should be placed in the form of an order or orders, and let me preface them with a brief statement:

This Wabash road is composed of many subdivisions. While it is a single corporation to-day, yet into it have passed many corporations and many separate railroad properties. In administering such a consolidated property the court must look at not merely the interest of the mortgagee in this general mortgage or of the mortgagor as a single entity or corporation, but also the separate and sometimes conflicting interests of the various subdivisions and their respective encumbrances, and, back of all that, the duty which every railroad corporation owes to the public, for underlying the rule which the Supreme Court has laid down in respect to the payment by re-

ceivers when they take possession of railroad property of prior unsecured debts recently accrued runs the thought, as expressed by the Supreme Court, that a railroad corporation owes a duty to the public, which has given it its franchise and enabled it to construct its road—the duty of operating that road for the benefit of the
148*d* public. While that may not be what you may call an absolute duty, enforcible under all circumstances, it is still a duty to be regarded and enforced by the courts when they take possession of railroads through their officers; and that duty is not limited to the operation of merely that particular fragment of a road which is pecuniarily profitable in its operations, but it extends to the road as an entirety and to all its branches, all its parts differing in that particular from the duty which would rest upon the court if it had simply taken possession of property used for private purposes, manufacturing or otherwise, where the single question might well be said to be one of pecuniary profit. This Wabash road as a system was in operation, a going concern, from one end to the other, as such discharging its duties as best it could to its various creditors. This court, at the instance of the corporation and to preserve the integrity of this system, took possession of it by its receivers. It took possession of it as a going concern, and so far as is reasonable and practicable it should continue it as a going concern until it surrenders it to whoever may be the purchasers or future holders of it.

With that preface, and calling these separate branches which have passed into this consolidated road subdivisions, since some have passed in by way of lease and others by way of consolidation, subject to separate mortgage, we pass orders substantially as follows:

The first is one which has already been entered, and we simply emphasize by repeating it, that subdivisional accounts must be kept separately. That was an order passed by Brother Treat at the very outset of this receivership in order that the particular equities of each one of these divisions, as between themselves, might be ascertained.

2. Where any subdivision earns a surplus over expenses the
148*e* rental or subdivisional interest will be paid to the extent of the surplus and only to the extent of the surplus. Any past diversion of such surplus for general operating expenses will be made good at once, and, if need be, by the issue of receivers' certificates. Thus, for illustration, this Toledo, Peoria and Western railroad appears by the report to have been earning a surplus over its operating expenses. That surplus is not the full rental price, and even that has not been paid to the lessor, having been used for general operating expenses. Any net earnings should be paid over to the lessor, or, if there be a subdivisional mortgage, to the mortgagee, and any such diversion as that should be made good and made at once. At the inception of this receivership an order was passed authorizing the issue of two million dollars receivers' certificates for the payment of such amount of prior debts for labor and material. Those have been partially paid, and without the issue of all of the certificates authorized, only a half a million having been issued. The receivers, hoping, doubtless, that the business of the road would

continue to be such that they need not issue more than half a million receivers' certificates, have diverted funds which should be applied to the payment of these rents, to the payment, partially, of this past indebtedness. To that extent the diversions should be restored.

3. Where a subdivision earns no surplus, simply pays operating expenses, no rent or subdivisional interest will be paid. If the lessor or the subdivisional mortgagee desires possession or foreclosure he may proceed at once to assert his rights. While the court will continue to operate such subdivision until some application be made, yet the right of a lessor or mortgagee whose rent or interest is unpaid to insist upon possession or foreclosure will be promptly recognized.

148*f* That, it is true, may work a disruption of the system, as evidenced by the movement just made in respect to this Cairo division, but the proceeding for disruption will come from the subdivisions. The court is not sloughing off branches, tearing the system in two, but the disruption, if it comes, will come from those who seek separation and have legal right to so do.

4. Where a subdivision not only earns no surplus, but fails to pay operating expenses, as in the St. Joseph and St. Louis branch, the operation of the subdivision will be continued, but the extent of that operation will be reduced with an unsparing though a discriminating hand—that is, if a subdivision does not earn operating expenses, and the receivers are running two trains a day, then lop one of them off; if they are running one train a day and still it does not pay, then run one train in two days. While the court will endeavor to keep that subdivision in operation, it will be made the burden of it to the consolidated corporation and to all the other interests put into that consolidated corporation a minimum. We have used the term "with an unsparing but a discriminating hand." By this we mean that certain things must be left to the discretion of the receivers. It may be that running one mixed train, proffering slight accommodation to the traveling public, would work a greater deficit than two trains, one furnishing the conveniences of a passenger train and the other purely a freight train; that must be left to the discretion of the receivers. The court is not in a position to determine as to what in any particular case will be most likely to work out a minimum deficit. If there is any controversy hereafter arising under the management of the receivers respecting any reduction, why, all the parties interested can apply to the court.

148*g* Some of these branches across the river seem upon the map at least to be so situated in respect to connections that a limited number of trains would answer all the real demands of the public, and that they would be operated with a very slight expense. Suppose, as of course it may be expected, there will continue to be a deficiency in the operating expenses of such subdivisions, such deficiency will be paid out of the general earnings of the consolidated road or, if need be, by the issue of receivers' certificates.

While we are, both of us, loath to go into the receivers' certificate

business and do as little of it as is reasonably possible for a court having such large properties in its hands, yet in such a case we think the emergency arises. Suppose we take possession of a single short line (and we have in one or two other cases), the continuance of that as a going concern is emphasized more than once by the Supreme Court, as a duty, as a reason for paying prior indebtedness, and also as a reason for issuing receivers' certificates. Stop operating it and it becomes a dead concern; its connections are broken up and its value is impaired. Therefore to preserve that value the courts have said that it has a right in a limited degree to issue receivers' certificates, and if that be true where the court has but a single line it is equally true where it has a road with various branches and as to all of those branches. The value of any branch abandoned is diminished, and the court may not consider simply the interests of the consolidated company, the mortgagor, and the trust company, the mortgagee. It is bound to regard the interests of each one of these subdivisions that went into the consolidated company and thus into the receivers' hands; and if the court may and ought to issue receivers' certificates in order to keep a single line a going concern, so, having possession of this system with its various branches, for the same reason and by the same means it should keep each one of them in operation.

149 There will be no modification of the order heretofore entered concerning receivers' certificates, but all equities respecting them, as between the various subdivisions, will be adjusted in the final decree. There may be, as counsel strenuously urged yesterday, a great many equities as between the various subdivisions in respect to the final burden of these receivers' certificates, but they have been authorized for only such claims as if no receivers' certificates had been issued and the road not taken possession of by the court—could have been cast into liens prior to all mortgages upon the road and all its branches; any single labor or material claim could have been cast into a lien which would have been a first lien on the North Missouri road—a lien antecedent to all its mortgages—and there is no impropriety in substituting receivers' certificates for that kind of claim. It simply puts it on the same basis as the claim stood before the certificate was issued. When it comes to a sale of the road or other final disposition of the matter it may be there will be such equities as will justify the casting of the burden of these certificates upon one subdivision rather than another. If the road goes into a single sale as an entirety the purchaser has got to take the burden of these receivers' certificates, and before the court passes the road out of its hands the receivers' certificates will be paid.

Application also is made for the reappointment of receivers or, as stated in the language of the motion, for extending the receivership to the trust company, the mortgagee in the general mortgage. I confess that I do not wholly understand why such an order as that is asked, and I cannot appreciate what counsel mean when they say make the receivers receivers for the trust company, the mortgagee. As we look upon it, the receivers are not receivers for either

party. They are simply the hand of the court. In the
150 process of the litigation the court has taken possession of the property and holds it neither for the mortgagor nor the mortgagee, and it matters not for the ultimate determination of the suit at whose instance the receivers were appointed. They act for neither party. They represent neither party. They stand here simply as the hand of the court, holding the property for disposition at the end of the litigation for the benefit of all.

So I cannot see what can be gained as a legal proposition by a new order of appointment extending the receivership, as counsel say, to the trust company, the mortgagee. The receivers will have no greater power, no different power, would owe no different duty, and would be no more and no less subject to the orders of this court than they are now, and certainly they would have no right in the operation of their trust to extend favors to the one side or the other.

Furthermore, as receivers appointed at the instance of the mortgagor in the first instance, they took possession of the entire properties, while this order as tendered contemplates a seizure of a part only of these properties, not all. Having taken possession of the road under the idea, in the first instance, that the integrity of the system had a value and should be preserved, it seems to us the receivership should continue right along in that line. There will be no reappointment of the receivers.

The motion of Mr. Hagerman, representing certain bondholders of the Toledo, Peoria and Western Railroad Company, must be overruled. We cannot turn the road over to the bondholders or force it upon trustees if they do not come here and ask for it. Partially, of course, the motion accomplishes its purpose, in that
151 the order will pass, as stated above, for paying over the surplus earnings as rent to the corporation.

I believe that minutes all the matters concerning which we have come to a conclusion. My brother Treat may wish to emphasize some portions of it.

TREAT, J.: I think you have covered all the points.

And thereupon it is ordered that the foregoing opinion stand as the order of the court with respect to the matters therein referred to.

To the above ruling of the court Lewis H. Meyer, trustee, by his solicitor, excepts.

152 And on Dec. 16th, 1884, said Quincy, Missouri and Pacific Railroad Company filed the following intervening petition in said cause No. 2357:

Intervening Petition of Quincy, Missouri & Pacific R. R. Co.

UNITED STATES OF AMERICA, *Eastern District of Missouri,* } *ss:*

In the Circuit Court of the United States for said District, of the September Term, A. D. 1884.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, Complainant, *vs.* THE CENTRAL TRUST COMPANY OF NEW YORK *et als.*, Defendants. } No. 2357. In Equity.

THE CENTRAL TRUST COMPANY OF NEW YORK & JAMES CHENEY, Complainants, *vs.* THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et als.*, Defendants. } No. 2357. Cross-Bill.

To the honorable the judges of said court, sitting in equity:

The humble petition of the Quincy, Missouri and Pacific Railroad Company, a corporation created & existing under and by virtue of the laws of Missouri and a defendant to the amended bill filed by complainant in the original cause above mentioned, the petitioner herein, states and shows unto your honors as follows, to wit:

1. That heretofore and on or about the 29th day of June, A. D. 1869, your petitioner became and was incorporated under the
153 general laws of the State of Missouri then in force; that on said last-named date its articles of association were duly filed in the office of the secretary of state for the State of Missouri; that your petitioner was so incorporated for the purpose of constructing, maintaining, and operating a railroad from the west end of the Quincy railroad bridge, or from a point near the same, on the west bank of the Mississippi river in Marion county, in the State of Missouri, opposite the city of Quincy, in the State of Illinois, on the most practicable and feasible route to and by way of Edina, in Knox county, and to and by way of Kirksville, in Adair county, to a point in Atchison county, Missouri, on the Missouri river, opposite the city of Brownsville, in the State of Nebraska.

2. That under its said original articles of association and an extension thereof granted in the early part of the year 1879 by the legislature of the State of Missouri your petitioner at the date of the contract of leasing next hereinafter mentioned had constructed and then had in operation a railroad extending from the end of said railroad bridge westwardly to a point near the town of Milan, in Sullivan county, in the State of Missouri, the entire length of said road so in operation being about seventy-seven miles; that to enable your petitioner to construct said road your petitioner had issued its first-mortgage bonds to the amount of about two million dollars, dated in the year 1871, and to secure the same your peti-

tion- also duly made, executed, acknowledged, and delivered to one Orville H. Browning and Winthrop S. Gilman, as trustees, its certain mortgage, bearing date the day & year last aforesaid, whereby it conveyed all its franchises and property to said last-named trustees to secure the payment of said last-named first-mortgage bonds; and your petitioner further states and shows that at said date of said contract of leasing said first-mortgage bonds to the
154 amount of the principal sum of about two million dollars, together with a very large amount of overdue interest accrued thereon, were still outstanding and unpaid, and the said last-named mortgage was then in full force and effect.

3. That on or about the 21st day of August, A. D. 1879, your petitioner, then owning and operating its said railroad to a point near said Milan, entered into a contract of lease for its said railroad and its other property, a copy of which said lease appears and may be found in volume I, Substituted Volume of Exhibits, as filed by complainant in this cause, at pages 329, 330, 331, 332, 333, 334, 335, 336, 337, & 338, to which said copy your petitioner craves leave to refer, and your petitioner makes said copy a part of this its said petition and asks that this petition may be treated in all respects as though said copy were embodied verbatim in this its petition at this point hereof instead of being referred to and made a part hereof by said reference, as just above done; and your petitioner, pursuant to the provisions of said lease and subsequently to the execution thereof, completed and extended its said railroad to said Milan and reduced its grades to comply with the provisions of said lease, and so that none of its grades (except one, as to which the provisions of said lease were waived) exceeded sixty-six and two-thirds feet as a maximum to the mile, and finally, on or about the first day of July, A. D. 1880, transferred the custody, control, and possession of said railroad of your petitioner and its other property in said lease mentioned and thereby demised to the complainant in this suit—that is to say, to "The Wabash, St. Louis and Pacific Railway Company" above named—& this your petitioner states that the "Wabash Railway Company," the original lessee in said above-named lease mentioned, and itself a consolidated corporation of the State of Illinois & other States, subsequently
155 to the execution thereof at the time and as above set forth and prior to the time when your petitioner had its road completed to said Milan as provided in said lease, was consolidated with some other corporation or corporations owning and operating certain railroad or railroads across said State of Missouri under the name of "the Wabash, St. Louis and Pacific Railway Company," and that by virtue of said last-named consolidation said complainant—that is to say, the railway company last named—succeeded to all the rights and obligations conferred and imposed upon said original lessee company (that is to say, said The "Wabash Railway Company") by said lease, and that the aforesaid transfer of the custody, control, and possession of said railroad and other property of your petitioner was made as aforesaid, pursuant to and under the provisions of said lease, to the above-named complainant

as succeeding by virtue of said last-named consolidation to all the rights of said The "Wabash Railway Company" under said lease.

4. That on or about the 31st day of October, A. D. 1879, and subsequently to the execution of said lease and pursuant to a vote of the stockholders of your petitioner made at a meeting duly called and held on the 22nd day of October, A. D. 1879, and pursuant to an order of the board of directors of your petitioner, your petitioner made, executed, acknowledged, and delivered its certain other mortgage, dated October 1st, A. D. 1879, and thereby conveyed to Orville H. Browning and Solon Humphreys the railroad, the property, and franchises of your petitioner, to secure the issue of bonds in said last-named mortgage particularly mentioned and described, a copy of which said last-named mortgage, with the certificate of acknowledgments thereto attached, appears and may be found in volume I, Substituted Volume of Exhibits, as filed
156 by complainant in this cause, at from pages 339, inclusive, to page 349, inclusive, to which last-named copy your petitioner hereby craves leave to refer, and your petitioner makes said last-named copy a part of this its said petition, and asks that this petition may stand and be treated in all respects as though said last-named copy were embodied and set forth verbatim at this point in said petition instead of being made a part hereof by reference, as just done; and your petitioner further states that upon the execution of said last-named mortgage the same was duly filed for record and recorded in the recorder's office of each of the following-named counties—that is to say, the county of Marion, the county of Knox, the county of Adair, the county of Grundy, and the county of Lewis, and the county of Sullivan—all of said counties last named and each of them being in the State of Missouri, and said last-named six counties being all of the counties into or through which the railroad of your petitioner as at the date of this petition constructed or in operation runs or extends; and your petitioner further states that by January 1st, 1880, said last-named mortgage had been recorded in every one of said last-named counties.

5. That after the execution and delivery of said last-named mortgage and pursuant to a vote of the stockholders of your petitioner at a meeting legally called in that behalf, to wit, at the meeting of stockholders last aforesaid and pursuant to an order of the board of directors of petitioner made and voted at a meeting of said board regularly called for and in that behalf, your petitioner, just prior to said transfer of its road and other property as aforesaid to said complainant and on or about the 29th of June, A. D. 1880, executed and issued and placed upon the market its 925 bonds of the denomination of one thousand dollars each; that each of said last-
157 named bonds were dated the first day of October, A. D. 1879, and payable on the first day of October, A. D. 1909; that each of said last-named bonds bore interest from the first day of January, A. D. 1880, at the rate of six per cent. per annum, payable semi-annually; that interest coupons for the respective semi-annual installments of interest to accrue, due on each of said bonds according to the tenor and effect thereof, were attached to said respective bonds;

that said last-named bonds, as to the terms and conditions thereof and the time and mode and place of payment, corresponded with the description of the bonds in said last-named mortgage contained, and are, as well as the respective interest coupons to each of them attached, secured by said last-named mortgage; that at the time of said issue of said 925 bonds your petitioner had built and constructed its railroad from the west end of said Quincy bridge westwardly through said counties of Marion, Lewis, Knox, and Adair counties to said Milan, in Sullivan county, Missouri, a distance of about 103 & over 102 miles; and your petitioner further states that out of the proceeds of sales of a portion of said 925 bonds, and through the use of others in the way of exchange, the whole of the bonds in the 2nd paragraph of this petition mentioned were taken up by or for your petitioner and the same were thereupon cancelled and destroyed, and the trustees named in the mortgage in said last-named paragraph mentioned duly released by proper deed to your petitioner the franchises and property by said last-named mortgage conveyed as freed and discharged from any lien or encumbrance thereby created thereon; and your petitioner states that said last-named release was made, as last aforesaid, on or about July 1st, 1880, and your petitioner states that at all times since the execution of said release the above-mentioned mortgage, of date October 1st, 1879, has been and still is the first lien upon the property and franchises of your petitioner.

158 6. Your petitioner further states that upon the aforesaid transfer and delivery of the said railroad and property of your petitioner to the complainant "The Wabash, St. Louis and Pacific Railway Company" said last-named company at once entered into possession of and ever since has been and still is in possession of said railroad and all the property of your petitioner named in and demised by said lease, and the said complainant has ever since taking possession as aforesaid of said railroad and property by said lease demised operated and still does operate said railroad of your petitioner, and said complainant, ever since said taking possession by it of said railroad of your petitioner, has received and still does receive the entire revenue and income derived from the running of said railroad of your petitioner, and your petitioner since said last-named taking possession of said railroad has been and still is without any revenue or source of income whatsoever.

7. That after the complainant aforesaid entered into and took possession of said railroad of your petitioner as last aforesaid said complainant undertook and on or about the first day of July, A. D. 1881, completed an extension of the said railroad of your petitioner from Milan to Trenton, in Grundy county, Missouri, a distance of 31 miles; that said Trenton ever since the completion of said extension has been and still is the western terminus of the railroad of your petitioner as the same has been completed and operated; that the entire length of your petitioner's said railroad, from its starting point at the western end of said railroad bridge to its said terminus at said Trenton, is between 133 & 134 miles; that upon or soon after the completion of said extension to said Trenton your petitioner

under the prov

issued a further installment of its bonds, said installment being a
further portion of the 3,000 bonds named in said mortgage
159 so as aforesaid dated October 1st, 1879, and consisting of 279
bonds of the principal sum of one thousand dollars each; that each of said last-named bonds corresponded in description with the description of the bonds contained in said last-named mortgage and was secured thereby; that each of said last-named bonds was of like tenor and date and has attached to itself like interest coupons for the semi-annual installments of interest to accrue, due on the same, as the 929 bonds mentioned above as issued under and secured by said last-named mortgage; that said 279 bonds and each of them were issued on or about July 1st, 1881, and more than two years prior to July 1st, 1884; that there are now outstanding in the hands of third parties, issued under and secured by said last-named mortgage, 1,204 bonds of the principal sum of one thousand dollars each.

8. By the provisions of said lease said The Wabash Railway Company, the lessee named in said lease, covenanted that it would guarantee and pay the interest on bonds of the kind and issue last above mentioned—that is to say, of the kind and issue of said 925 bonds and said 279 bonds—at the rate of 9,000 dollars a mile for each mile of completed road, and would evidence said guaranty by proper stipulation endorsed on said bonds; and your petitioner states that afterwards and pursuant to the provisions of said lease and prior to the issuing of said 1,204 bonds respectively the said complainant, as succeeding to the rights and liabilities of said "The Wabash Railway Company," the lessee named in said lease, did endorse upon each of said last-named bonds and duly execute thereon its contract guaranteeing the payment of the interest to accrue, due on said last-named bonds and each of them, and did thereby duly guarantee the payment at maturity of each of the interest coupons to each of said last-named bonds attached; and your petitioner further states
that the said complainant, as succeeding to the liability of
160 said lessee, "The Wabash Railway Company," by virtue of
the consolidation aforesaid, was liable to pay, and by virtue of the provisons of said lease did undertake to pay, absolutely and at all events, the successive semi-annual installments of interest on each of said 1,204 bonds last named as said installments of interest respectively fell due.

9. That on the first day of July, A. D. 1884, one semi-annual installment of interest on each of said 1,204 bonds was due and payable by the tenor and effect thereof; that on said last-named date one interest coupon attached to each of said bonds last named, and representing said installment of interest, became and was due and payable at the agency of your petitioner in the city of New York, in the State of New York, by the tenor and effect of each such coupon; that the said semi-annual installment of interest on the said last-named bonds has never been paid, in whole or in part, by complainant, "The Wabash, St. Louis & Pacific Railway Company," or any person or corporation whatever; that said interest coupons representing said last-named installment of interest and attached to said 1,204 bonds

have never been paid, in whole or in part, by said complainant o any other person or corporation whatever; that on and prior to sai July 1st, 1884, your petitioner had an agency at the city of N- York, in the State of New York; that said agency was the plac of payment for said last-named coupons and every of them, acc- ing to their respective tenor and effect; that said complaina did not provide or place funds and moneys at said agency or elsewhere to meet said installment of interest so as aforesaid falling due July 1st, 1884, or said interest coupons representing the said installment of interest or any of them; that on said July 1st, 1884, the holders of a large number of the coupons last named presented the same for payment at said agency and
161 then and there demanded payment of the same; that payment of the same was refused for want of funds at said agency to pay with; that said last-named holders of said coupons also presented the same for payment at the office and place of business of complainant, in said New York city, on the date last aforesaid, and at said office last named demanded payment of said coupons so presented, and at said last-named office payment of said last-named coupons was also refused for want of funds; that said complainant has utterly and entirely failed to pay and has utterly neglected to provide funds or moneys with which to pay said last-named installment of interest so due July 1st, 1884, or any of the coupons on said 1,204 bonds or therefrom detached representing the same, and that said coupons last named, as well as the interest due July 1st, 1884, on said 1,204 bonds, remain and each of them remains wholly unpaid, and said complainant has on and since said July 1st, 1884, been in default in paying said July 1st, 1884, installment of interest and said coupons representing the same, as also in the performance of its contract of guaranty above mentioned in so far as relates to said last-named coupons.

10. That by the provisions of said mortgage of date October 1st, 1879, by which mortgage the payment of the principal sum of and interest on said 1,204 bonds is secured, it is, in substance and effect, provided that if your petitioner shall fail to pay the principal of said last-named bonds and of every of them or any part thereof or any part of the interest coupons to the said bonds respective- annexed at any time when the same shall become due and payable according to the tenor of said bonds and coupons for the period of six months after proper demand for payment thereof at the place mentioned for the payment thereof, then and in either such case that the trustees named in said mortgage or their successors in such trust shall, upon the
162 request in writing of the holders of one-half of the amount of said 1,204 bonds (that being the number now outstanding and unpaid), cause all the premises, property, franchises, rights, and valuable things described in and covered by said last-named mortgage to be put up and sold at public auction to the highest bidder for cash, after having advertised such sale as in said mortgage provided, to pay and satisfy said last-named bonds and the overdue interest thereon. Your petitioner states that it has no means, property, or moneys aside from what is covered by said mortgage, and

that it is without any means of paying said overdue and defaulted interest.

Your petitioner shows that by the provisions of said mortgage last named if said interest so as aforesaid due July 1st, 1884, shall remain unpaid until January 1st, 1885, it will be in the power of the holders of a majority of said 1,204 bonds, because of such continued default, to require the trustees named in said last-named mortgage or their successors to expose for sale, at public auction, to the highest bidder, for cash, the entire property and franchises of your petitioner.

11. Your petitioner states upon information and belief that the holders of said 1,204 bonds or a majority of them will, if default in payment of said interest coupons so as aforesaid falling due July 1st, 1884, shall continue until the first day of January, A. D. 1885, at once, after the said last-named day shall have passed, give directions in writing, under and pursuant to the provisions of said last-named mortgage and to the clause thereof last above mentioned, requiring the sale of the property, railroad, franchises, and other valuable things in said mortgage described and thereby conveyed, at public auction, to the highest bidder, for cash, under the provisions of said last-named mortgage.

163 Your petitioner, being so informed as last aforesaid, has applied by its officials for information to the president of complainant and to others of its officers to find out whether said complainant or any one on its behalf would pay or make provision for the payment of said defaulted interest on or prior to January 1st, 1885, but your petitioner has been unable to get from the person or persons so applied to any information of any intention on the part of said complainant or any one for it so to do.

12. Your petitioner represents and states that in the construction of its said railroad your petitioner, after due vote of its stockholders at a meeting duly called for the purpose, voted to issue its certain other bonds to the amount of 2,000,000 dollars, and to secure the same by a second mortgage upon the property and franchises and railroad of your petitioner; that pursuant to said last-named vote your petitioner duly executed, acknowledged, and delivered its certain other mortgage, the same being a second mortgage upon the property, railroad, franchises, and other things of value belonging to your petitioner, a copy of which last-named mortgage appears and may be found in volume I, Substitute Volume of Exhibits, as filed by said complainant in said cause, at from pages 350 to 363, both inclusive; that said last-named mortgage was duly recorded in the several counties of said State of Missouri in which the mortgage above mentioned as dated October 1st, 1879, was recorded; that said last-named second mortgage was executed and delivered soon after its date; that of the 2,000,000 dollars of bonds above mentioned there have been at different times issued different portions thereof; that there are now outstanding and unpaid bonds of said last-named issue to the amount of one million & seventy thousand four

164 hundred ($1,070,400) dollars, and the form of one of said last-named bonds appears and is found in volume I of said

Substitute Volume of Exhibits, at pages 351, 352, 353, & 354, and your petitioner makes said copy of said second mortgage and the certificates of acknowledgments thereto annexed, to which your petitioner craves leave to refer, a part of this petition, and prays that said petition may be deemed and treated in all respects as though said copy were at this point in this petition set out verbatim.

13. Your petitioner further states that, in addition to the bonds above mentioned, your petitioner has issued a large amount of capital stock in payment of subscriptions and in settlement and discharge of its indebtedness; that there is now held by different individuals & corporations, municipal and others, shares of the capital stock of your petitioner to the amount of about two and one-half millions — dollars, if reckoned at its par value, as petitioner believes.

14. Your petitioner represents that it has a valuable railroad, property, and franchises, and that if a sale shall take place by virtue of the direction of the holders of said 1,204 bonds or a majority of them, as your orator is informed is threatened, your petitioner will be stripped of its said railroad, its property, and its franchises, and the large interests of the holders of the said second-mortgage bonds and of the holders of said capital stock in the property of your petitioner will be sacrificed and rendered valueless.

15. Your petitioner states that the St. Joseph and Quincy Railroad Company, a corporation created and existing under and by virtue of the laws of the State of Missouri, is ready and willing to accept a transfer and assignment by the complainant aforesaid of said lease first above mentioned and of the residue of the term
165 therein named for the duration of said lease and of the property thereby demised; and your petitioner further states upon information and belief that the said last-named corporation is willing to accept said transfer and assignment upon the terms following—that is to say: Said last-named corporation will, cotemporaneously with the execution and delivery by the complainant of proper instruments of assignment and transfer of said lease and the property therein mentioned, pay off, satisfy, and discharge each & every of the coupons for interest on said 1,204 bonds due July 1st, 1884, as aforesaid, and will also, at the same time last named, either pay off or give proper & sufficient security for the speedy & prompt payment of the coupons for interest on said last-named bonds & every of them to become due on January 1st, 1885, and said last-named corporation will assume any and all liability and liabilities resting upon said complainant or to which it is subject by reason of the existence of or under said lease.

16. And your petitioner further states upon information & belief that if said St. Joseph & Quincy Railroad Company shall secure said assignment and transfer of said lease and property it will speedily build a line of railroad from the city of St. Joseph, in the State of Missouri, eastward to said Trenton, the aforesaid present terminus of the road of your petitioner, and that it will make said road of your petitioner a part of a through line from the Mississippi to the Missouri river,

extending from the city of Quincy, Illinois, to said city of St. Joseph; and your petitioner believes, and therefore so states, that if this should be done your petitioner would be enabled to save its property, railroad, and franchises, and that the interests of said second-mortgage bondholders and said stockholders in the property of your petitioner would be saved and preserved and made valuable.

17. And your petitioner further states that the financial
166 condition of said complainant is shown by and appears from the records of the above-entitled cause in this court, and your petitioner represents upon information and belief that said complainant is utterly insolvent.,

18. Your petitioner, upon information and belief, says that the St. Louis, Iron Mountain and Southern Railway Company claims some interest in the railroad and property of your petitioner demised by the lease aforesaid and in said last-named lease itself, and that such interest arises under and by virtue of a certain agreement between complainant and said last-named company and under and by virtue of a certain mortgage, copies of which agreement last named and mortgage last aforesaid appear and may be found in said volume I, Substituted Volume of Exhibits, as filed by said complainant in this cause, the former at pages 22 & following pages, and there marked Exhibit C, & the latter at pages 47 & following pages, and there marked Exhibit E, to which last-named copies respectively your petitioner asks leave to refer, and makes the same and each of them a part hereof, and asks that this petition be treated in all respects as though said last-named copy was here set out verbatim instead of being referred to, and that said St. Louis, Iron Mountain and Southern Railway Company is a defendant to complainant's original bill as filed in this cause, & is a citizen and resident of said State of Missouri as therein stated.

19. And your petitioner further represents and states upon information and belief that the Central Trust Company of New York and James Cheney, two other defendants to said original bill and respectively citizens and residents as therein stated, claim some right, title, or interest in and to the lease hereinbefore first above mentioned between your petitioner, of the one part, and "the
167 Wabash Railway Company," of the other part, and that said interest is derived under a certain mortgage, a copy of which last-named mortgage, with the certificates thereto attached, appears and is found in said volume I, Substituted Volume of Exhibits aforesaid, at from pages one to twenty-one, both inclusive, and is there marked "Exhibit B," to which last-named copy your petitioner craves leave to refer and makes the same a part hereof, and asks that this petition be treated as though the said last-named copy were here set out verbatim instead of being here referred to.

20. Your petitioner represents and states upon information & belief that any and all said or other rights and interest of the said The St. Louis, Iron Mountain and Southern Railway Company and said Central Trust Company of New York and said James Cheney or either of them, unless upon terms of the payment by one or either of them of the above-mentioned interest and interest coupons so as

aforesaid falling due July 1st, 1884 (and in the payment of which said complainant is in default as aforesaid), ought in equity and justice to be held subject to the right of your petitioner to save itself, its franchises, and its property by receiving the assignment & transfer of the lease first herein mentioned to said The St. Joseph & Quincy Railroad Company, as herein & hereby asked for; and your petitioner further shows unto your honors that if said default in the payment of said coupons falling due July 1st, 1884, shall continue until January 1st, 1885, that your petitioner, under the provisions of the lease herein mentioned, will be entitled, because of such continued default, to declare a forfeiture of said last-named lease, and upon so doing your petitioner will be entitled to take possession of the railroad and property of your petitioner described in said lease without process of law, and that the lapse of time is about to make the said right, title, and interest of said The St. Louis,
168 Iron Mountain and Southern Railway Company & of the Central Trust Company of New York and the said right, title, and interest of said James Cheney of no value whatever.

21. Your petitioner further represents that this petition is filed under and pursuant to a resolution of the board of directors of your petitioner, at a meeting of said board duly passed; that at said meeting said board approved of and consented to a transfer of the first herein-mentioned lease and an assignment thereof to said The St. Joseph & Quincy Railroad Company upon the terms above mentioned as those upon which said last-named company is willing to accept said transfer.

22. Your petitioner therefore, being desirous of saving its railroad, its other property & franchises, from being swept from it and desirous of saving the valuable rights and interests of its stockholders and second-mortgage bondholders from destruction, files this its humble petition, and hereby prays that in case it shall be thought by your honors that the subject-matter hereof and the matters hereby prayed for are properly the subject-matter of a cross-bill and not of a petition, that in such event this petition may be deemed and taken to be the cross-bill of your petitioner as orator therein, alleging and setting forth as herein alleged and praying as herein prayed; that your honors may order that said "The Wabash, St. Louis & Pacific Railway Company," said "The St. Louis, Iron Mountain and Southern Railway Company," said "The Central Trust Company of New York," and said James Cheney may be made respondents or defendants hereto; that said respondents or defendants may be ordered to answer this petition within some short day to be appointed by your honors; that your honors may proceed to a hearing of the subject-matter hereof; that you- honors will order that said respondents or defendants or some one of them shall pay the interest on the bonds above mentioned as in default on and since July 1st, 1884, or that out of the funds of complainant afore-
169 said, in the charge or under the control of said court or the receivers heretofore by this court in this behalf appointed, said defaulted interest be paid within some short day and before such default shall have continued six months, or that the said court

will order that said lease first herein mentioned, viz., the one above mentioned, as made between your petitioner and said The Wabash Railway Company, be by said complainant, and freed from any lien or rights of the said respondents or any of them therein or thereto, duly assigned and transferred unto said The St. Joseph and Quincy Railroad Company and the property of your petitioner by said lease demised and now in the hands of the receivers of this court be delivered over into the possession of said last-named company upon its agreeing to and performing the conditions as to the payment of interest and assuming by proper agreement in writing the obligations and liabilities resting on complainant under said lease—that is to say, upon the terms above stated, as those on which said last named The St. Joseph & Quincy Railroad Company is willing to accept said assignment and transfer, and for such other and further relief as shall protect your petitioner from the loss of its property and the virtual destruction of its corporate existence, and for such further & other relief as to your honors shall seem meet.

And your petitioner will ever pray, &c.

THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY,
By OVERALL & JUDSON,
Its Solicitors and of Counsel.

STATE OF MISSOURI, } ss:
County of St. Louis, }

Charles H. Bull, being first duly sworn, on oath says that he has read the foregoing petition and knows the contents
170 thereof, and that the matters and things therein stated are true in substance and in fact except as therein stated on information and belief, and as to the matters and things therein stated upon information and belief affiant believes them to be true, and affiant says that he now is and for several years last past has been the president of the above-named petitioner, "The Quincy, Missouri and Pacific Railroad Company."

CHARLES H. BULL.

Subscribed and sworn to before me this sixteenth day of December, A. D. 1884.

[SEAL.] W. H. SCUDDER, JR.,
Notary Public, City of St. Louis, Mo.

And on December 23rd, 1884, the following answer to said last-named intervening petition was filed:

Answer of Receivers to said Last-Named Intervening Petition.

In the Circuit Court of the United States for the Eastern District of Missouri.

WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, Complainant, *vs.* CENTRAL TRUST CO. OF NEW YORK *et al.*, Defendants.	No. 2357. In Chancery.

Answer of receivers to the intervening petition of the Quincy, Missouri and Pacific Railroad Company.

Now come Solon Humphreys and Thomas E. Tutt, receivers, by their attorney, and for answer to the intervening petition of the Quincy, Missouri and Pacific Railroad Company in said cause filed deny each and every allegation in said intervening petition
171 therein contained and set forth.

Wherefore, having fully answered, said receivers ask to be discharged with their costs in this behalf expended.

WELLS H. BLODGETT,
Attorney for Solon Humphreys and Thomas E. Tutt, Receivers.

And on February 7th, 1885, the Central Trust Company of New York and James Cheney, trustees, filed the following answer to said intervening petition:

Answer of Central Trust Co. of N. Y. et al. to said Last-Named Intervening Petition.

In the Circuit Court of the United States for the Eastern District of Missouri.

WABASH, ST. LOUIS & PACIFIC RAILWAY CO., Complainant, *against* THE CENTRAL TRUST CO. OF NEW YORK *et al.*, Defendants.	No. 2357. No., —. No., 69.	Clerk's Master's

In the matter of the intervening petition of the Quincy, Missouri and Pacific Railway Co.

Now comes the Central Trust Company of New York and James Cheney, trustees under the general mortgage of the Wabash, St. Louis & Pacific Railway Company made and executed the first day of June, 1880, by their attorneys, and for answer to the petition of the Quincy, Missouri and Pacific Railroad Company say:

First. That they admit all of the allegations contained in the first and second paragraphs of said intervening petition.

Second. That they admit all of the allegations contained in para-

graph 3 of said intervening petition, except the allegation that said petitioner, pursuant to the provisions of said lease and subse-
172 quent to the execution thereof, completed and extended its said railroad to said Milan and reduced its grade to comply with the provisions of said lease, so that none of its grades, except one, as to which the provisions of said lease were waived, exceeded 66⅔ feet as a maximum to the mile; which said allegation they wholly deny, but admit all the other allegations contained in said paragraph 3.

Third. They admit all the allegations contained in paragraph 4 of said intervening petition.

Fourth. They deny all the allegations contained in paragraph 5 of said intervening petition.

Fifth. They admit all the allegations contained in paragraph 6 of said intervening petition, except the allegation that said petitioner since taking possession of said railroad by said complainant has been and still is without any revenue or source of income whatsoever, which allegation they wholly deny and, on the contrary, aver that said lease mentioned and described in paragraph 3 of said intervening petition provided a source of revenue for said intervening petitioner from the operation of said road by the complainant in this cause.

Sixth. They admit that after the complainant entered into and took possession of said railroad, on or about the first day of July, 1881, said complainant completed said railroad from Milan to Trenton, in Grundy county, Missouri, a distance of 21 miles; that said Trenton since the completion of said extension has been and still is the western terminus of said railroad as the same has been completed and operated; that the length of said railroad from its starting point from the western end of said railroad bridge to said terminus at Trenton is between 133 and 134 miles, as alleged in paragraph 7 of said intervening petition, but they deny all the other allegations contained in said paragraph 7 of said intervening petition.

173 Seventh. They admit that by the provisions of said lease the Wabash Railway Company covenanted that it would guarantee and pay all interest on the bonds, as alleged in paragraph 8 of said intervening petition, at the rate of nine thousand dollars per mile for each mile of completed road, and would evidence said guarantee by proper stipulations endorsed on said bonds, and that pursuant to the provisions of said lease the said complainant, as successor to the rights and liabilities of said Wabash Railway Company, did endorse upon certain bonds issued by said intervenor and duly executed thereon its contract, guaranteeing to pay the interest to accrue and become due on said bonds, and did guarantee the payment at maturity of each of the interest coupons on said bonds, and that said complainant became liable to pay, and by virtue of the provisions of said lease did undertake to pay, the successive semi-annual installments of interest on said bonds the interest of which was so guaranteed by said complainant, as alleged in said paragraph 8, but denies that said Wabash

Railway Company or said complain-t undertook to pay the same absolutely and at all events, but that said Wabash Company did undertake to pay the same, as is stipulated in said lease, and that complainant, as successor to said Wabash Railway Company, became liable in its stead upon the contract so made by the Wabash Railway Company.

Eighth. They deny all the allegations contained in paragraph 9 of said intervening petition.

Ninth. They admit that by the provisions of a mortgage dated October 1st, 1879, it is provided that, if said petitioner should fail to pay the principal of the bonds therein named or of any part thereof or any of the interest coupons on said bonds at the time when the same shall become due and payable according to the tenor of said bonds and coupons for the period of six months
174 after the proper demand of payment at the place mentioned for the payment thereof, the trustees named in said mortgage or their successors in the trust should, upon the written request of the holders of the one-half of the amount of said bonds, cause all of the premises, property, franchises, rights, and valuable things secured in and covered by said mortgage to be sold at public auction to the highest bidder for cash, after having advertised such sale as is in said mortgage provided, to pay and satisfy the bonds and overdue coupons thereon and therein named, as is alleged in paragraph 10 of said intervening petition, but they deny all the other allegations contained in said paragraph 10.

Tenth. And, further answering, they say that they have no knowledge or information sufficient to form a belief touching any of the allegations in said intervening petition as are contained in paragraphs 11, 12, 13, 14, 15, and 16 of said intervening petition, and that therefore they can neither admit nor deny the same, but leave the said intervenor to make such proof thereof as it may be advised.

Eleventh. They deny all the allegations contained in paragraph 17 of said intervening petition.

Twelfth. They admit all the allegations contained in paragraphs 18 and 19 of said intervening petition.

Thirteenth. They deny all the allegations contained in paragraph 20 of said intervening petition.

Fourteenth. They have no knowledge or information sufficient to form a belief touching the allegations contained in paragraph 21 of said intervening petition, and therefore can neither admit nor deny the same, but leave said intervenor to make such proof thereof as it may be advised.

Fifteenth. They deny all the allegations contained in paragraph 22 of said intervening petition.

175 Sixteenth. And for further answer they say that it would be inequitable and unjust that the prayer contained in said intervening petition be granted upon any other terms than that The Wabash, St. Louis & Pacific Railway Company, the complainants in this cause, should be relieved of the guaranty made by said Wabash Railway Company, described in said intervening petition and

mentioned in this answer, upon the bonds the interest on which was guaranteed by said Wabash Railway Company; and they therefore pray that if the prayer of said intervenor shall be granted that the same be granted only upon the terms that the holders of said bonds or any or all of them shall release said Wabash railway and the Wabash, St. Louis and Pacific Railway Company from said guaranty and every part thereof, or that said intervenor otherwise fully and amply secure said Wabash, St. Louis & Pacific Railway Company and all persons interested in it from any loss, default, or damage for or upon account of the guaranty of said bonds or any part or portion thereof.

And, as in duty bound, will ever pray, &c.

BUTLER, STILLMAN & HUBBARD AND
PHILLIPS & STEWART,
Attorneys for Central Trust Co. of New York and James Cheney, Trustees.

And on February 16th, 1885, the following amended answer to said last-named intervening petition was filed by the receivers:

Amended Answer of Receivers to said Last-Named Petition.

In the Circuit Court of the United States for the Eastern District of Missouri, September Term, A. D. 1884.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, Complainant,
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK *et al.* } In Chancery.

176 The amended answer of Solon Humphreys and Thomas E. Tutt, receivers, etc., to the intervening petition of the Quincy, Missouri and Pacific Railway Company.

These respondents, for answer to said intervening petition or to so much or such parts thereof as they are advised is material for them to make answer unto, answering, say:

They admit all the allegations of said intervening petition to be true except as to the organization as a corporation of the St. Joseph and Quincy Railroad Company and except as to the averment that if the St. Joseph and Quincy Railroad Company shall secure the assignment and transfer of the lease of the line of railroad mentioned in said petition it will speedily build a railroad from the city of St. Joseph to the town of Trenton and make the same a part of a through line from the Mississippi to the Missouri river, etc.

As to the truth of these averments respondents have no knowledge or information except as they are informed by said petition, and therefore neither admit -or deny the same.

These respondents admit the default in the payment of interest upon the bonds of the said intervenor, as charged in said intervening petition, and in respect to the failure to pay said interest they charge the fact to be that since said line of railway of said intervenor came

into the possession of respondents as receivers and since the operation of the same by them as such receivers the operating expenses, cost of maintenance, and taxes of said line largely exceeded the earnings and income of the same, and that these respondents, in the operation of said line since the same came into their possession as such receivers, have incurred the expenditure of a large sum of money, to wit, the sum of two thousand dollars and upwards, in excess of the earnings and income derived therefrom, and
177 that they have not, since their appointment as such receivers, had in their possession any money arising from the operation of said line of railway in excess of the cost of operating and maintaining the same wherewith to pay the interest on said bonds.

Wherefore these respondents have failed and refused to pay said interest, as they lawfully might, for the cause aforesaid; and, having fully answered, these respondents ask to be hence dismissed, etc.

WELLS H. BLODGETT,
Solicitor for Solon Humphreys and Thomas E. Tutt, Receivers.

And on March 13th, 1885, the following demurrer to said last-named intervening petition was filed by the St. Louis, Iron Mountain and Southern Railway Company:

Demurrer of St. Louis, Iron Mountain & Southern Railway Co. to said Petition.

In the Circuit Court of the United States for the Eastern District of Missouri, September Term, A. D. 1884.

THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, Complainants,
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Defendants.
} In Chancery.

Demurrer of the St. Louis, Iron Mountain and Southern Railway Company to the intervening petition of the Quincy, Missouri & Pacific R. R. Co.

Said St. Louis, Iron Mountain and Southern Railway Company, by protestation, not confessing or acknowledging all or any of the matters and things in said intervening petition contained to be true in such manner and form as the same are therein set
178 forth, doth demur thereto, and for cause of demurrer showeth that the said petition contains no matter of equity entitling the petitioner to the relief prayed for.

Wherefore and for divers other defects and causes of demurrer appearing in the said intervenor's petition said St. Louis, Iron Mountain & Southern Railway Company demurs thereto and humbly demands the judgment of this honorable court whether it shall be compelled to make any answer to the said intervening petition, and

prays to be hence dismissed with its costs in this behalf most wrongfully sustained.

THOS. J. PORTIS,
Att'y for St. L., I. M. & S. R'y Co.

I hereby certify that I have read the intervening petition of the Quincy, Missouri & Pacific R. R. Co. in the above cause, and that the above demurrer is, in my opinion, well founded in point of law.

THOS. J. PORTIS,
Att'y for St. L., I. M. & S. R'y Co.

STATE OF MISSOURI, } ss:
City of St. Louis, }

R. S. Hayes, of lawful age, being duly sworn, says that he is the first vice-president of the St. Louis, Iron Mountain and Southern Railway Company, and that the foregoing demurrer is not interposed for delay, but in good faith for the causes therein set forth.

R. S. HAYES.

Subscribed and sworn to before me this 13th day of March, A. D. 1885.

[SEAL.] STEPHEN D. BARLOW,
Notary Public.

179 On the 16th day of April, 1885, the following order was made in said cause by said court:

In the Circuit Court of the United States for the Eastern District of Missouri, March Term, 1885.

CENTRAL TRUST COMPANY *et al.*
vs.
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*
} Nos. 2357 and 2464. Consolidated Cause.

Order as to Quincy, Missouri and Pacific Railroad Company, April 16, 1885.

Now, on this day, comes The Quincy, Missouri and Pacific Railroad Company, a corporation, defendant in the above cause, and informs this court—

That by lease dated August 21, 1879, the railroad of the said Quincy, Missouri and Pacific Railroad Company, then extending from the Mississippi river at Quincy, Ill., westwardly to the town of Milan, in the State of Missouri, with its other property, was demised and leased to the "Wabash Railway Company," and that subsequently the Wabash, St. Louis and Pacific Railway Company succeeded to the rights of said Wabash Railway Company under said lease.

That by deed of mortgage, paramount to said lease, dated October 1, 1879, the Quincy, Missouri and Pacific Railroad Company con-

veyed all its property and franchises to Orville H. Browning
180 and Solon Humphreys in trust to secure an issue of bonds, whereof $1,204,000 have been issued and are now outstanding; that by deed of mortgage dated October 1, 1879, the Quincy, Missouri and Pacific Railroad Company conveyed all its property and franchises to Amos Green and Charles H. Bull to secure an issue of second-mortgage income bonds, whereof $1,070,400 are now outstanding.

That by death or resignation of their predecessors and due appointment Theodore Gilman and Charles H. Bull have become trustees of said first-named mortgage in place of said Browning and Humphreys.

That by the terms of said aforementioned lease the Wabash, St. Louis and Pacific Railway Company guaranteed the payment of the interest of the said first-mortgage bonds as the same should become due.

That the said Wabash, St. Louis and Pacific Railroad Company has failed to pay the interest on said outstanding first-mortgage bonds falling due July 1, 1884, and January 1, 1885, amounting to upwards of $75,000.

That on the 29th day of May, 1884, Solon Humphreys and Thomas E. Tutt were appointed receivers of the said Wabash, St. Louis and Pacific Railway Company, and under order of this court took possession of the said leased line, the Quincy, Missouri and Pacific Railroad Company, and have ever since operated the same; that the expense of operating the said lease line since the same has been operated by said receivers has been greatly more than the receipts received therefrom.

That by reason of the failure to pay said interest on said first-mortgage bonds said trustees have the right to demand and receive
181 possession of said leased line and sell the same in satisfaction of said first-mortgage bonds, and said lease is thereby subject to forfeiture, and a suit to foreclose said first mortgage has been begun in this court.

That said Quincy, Missouri and Pacific Railroad Company has a valuable railroad property and franchises, and if a sale should take place under said first mortgage said company will be stripped of its railroad, its property, and its franchises, and the large interest of the holders of said second-mortgage bonds and of the capital stock of said company will be sacrificed and rendered valueless.

That the St. Joseph and Quincy Railroad Company are willing to accept a transfer and assignment by said Wabash, St. Louis and Pacific Railway Company of said lease and of the residue of the term therein named for the duration of said lease of the property thereby demised upon the following terms—that is to say: Said St. Joseph and Quincy Railroad Company will, contemporaneously with the execution and delivery by said Wabash, St. Louis and Pacific Railway Company of proper instruments of assignment and transfer of said lease and the property therein mentioned, pay off, satisfy, and discharge each and every of the coupons for interest on said 1,204 first-mortgage bonds, due July 1, 1884, and January 1, 1885, as afore-

said, and assume any and all liability and liabilities resting upon said Wabash, St. Louis and Pacific Railway Company on which it is subject by reason of the existence of or under said lease.

And the said Quincy, Missouri and Pacific Railroad Company having prayed the court by its petition herein that it order that said lease be by said Wabash, St. Louis and Pacific Railway Company, and freed from any lien or rights of the said Wabash, St. Louis and Pacific Railway Company and the Central Trust Company of New York and James Cheney, trustees, duly assigned and transferred unto the said St. Joseph and Quincy Railroad Company, and
182 the property of the said Quincy, Missouri and Pacific Railroad Company by said lease demised and now in the hands of the receivers of this court be delivered over to the possession of said St. Joseph and Quincy Railroad Company upon their agreeing to and performing the conditions as to the payment of interest and assuming, by proper agreement in writing, the obligations and liabilities resting on said Wabash, St. Louis and Pacific Railway Company under said lease, and the said receivers and the Central Trust Company of New York and James Cheney, of Indiana, trustees, and also all other parties interested having due notice thereof—

It is hereby ordered that whenever, within sixty days from the date hereof, said St. Joseph and Quincy Railroad Company shall pay to said trustees on said first mortgage an amount equal to the coupons on said first-mortgage bonds of the Quincy, Missouri and Pacific Railroad Company, due July 1st, 1884, and January 1st, 1885, in payment of said coupons, and shall assume, by proper agreement in writing, the obligations and liabilities henceforth to be performed by the lessee under said lease, then said lease shall thereupon become assigned and vest in said St. Joseph and Quincy Railroad Company, freed from any lien or rights of said Wabash, St. Louis and Pacific Railway Company and of the said Central Trust Company of New York and James Cheney, of Indiana, trustees as aforesaid, and this order shall thereupon stand as an assignment of said lease, and the property of the said Quincy, Missouri and Pacific Railroad Company by said lease demised and now in the hands of said receivers shall thereupon be delivered over by said receivers into the possession of said St. Joseph and Quincy Railroad Company: Provided, however, that no exceptions to this order are filed within thirty days of the date hereof, and the master herein shall report compliance with the terms herein stated.

183 *Affidavit of D. B. Howard.*

In the Circuit Court of the United States for the Eastern District of Missouri.

CENTRAL TRUST COMPANY OF NEW YORK *et al.*
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*

In re intervening petition of Quincy, Missouri & Pacific Railway Company for the recovery of rental.

STATE OF MISSOURI, *City of St. Louis,* } *ss:*

D. B. Howard, being first duly sworn, upon his oath states that prior to May 29th, 1884, he was the auditor of the Wabash, St. Louis & Pacific R'y Co., and that since said date he has been the auditor of Solon Humphreys and Thomas E. Tutt, the receivers of the property of said company, and that as such auditor he has had charge of their books and accounts and is familiar with said books and with the several reports from time to time made therefrom and filed in the above-entitled cause. Affiant further states that the following facts appear from the several reports of said receivers made, filed, and approved by the court in said cause, to wit:

1st. It appears that the total of the labor and supply debts of the said Wabash, St. Louis & Pacific R'y Co. existing when said receivers were appointed on the 29th day of May, 1884, together with the taxes due on said property and the other preferential indebtedness of said company existing at said date and which said receivers were directed to pay, amounted to the sum of $4,417,491.

2nd. It appears that the total net earnings of the entire
184 system of railroads operated by said receivers from the date of their appointment, on the 29th day of May, 1884, to the 16th day of April, 1885, amounted to the sum of $1,175,653.21.

3rd. It appears that the net earnings of said system from the date of the appointment of said receivers, on the 29th day of May, 1884, to the first day of August, 1885, the date on which the Quincy, Missouri & Pacific railroad (which had previously been operated by said receivers as a part of said system) was surrendered to Gilman and Bull, trustees in the first mortgage thereon, amounted to the sum of $1,012,857.39.

D. B. HOWARD.

Subscribed and sworn to before me, the undersigned, a notary public within and for the city of St. Louis, this 27th day of June, A. D. 1888.

My commission expires June 29th, 1889.

[SEAL.] MILLARD F. WATTS,
Notary Public.

For the purpose of abbreviating the record it is stipulated and agreed by and between the parties to this intervening cause that the

above and foregoing affidavit of D. B. Howard may be inserted in the record as evidence of the facts therein stated instead of the several voluminous reports of said receivers from which said facts appear.

On the 15th day of July, 1885, the following order was entered in said cause in said court:

185 In the Circuit Court of the United States for the Eastern District of Missouri.

THE CENTRAL TRUST CO. OF NEW YORK and Others, Complainants, *vs.* THE WABASH, ST. LOUIS AND PACIFIC RAILWAY CO. *et al.*, Defendants.	Nos. 2357 and 2464. Consolidated Cause.

Order on Petition of Gilman and Bull, Trustees, for Possession of Mortgaged Property July 15th, 1885.

Now, at this day, come Theodore Gilman and Charles H. Bull and duly represent to the court that they are trustees under a certain mortgage made by the Quincy, Missouri and Pacific Railroad Company on the first day of October, 1879, to secure its mortgage bonds to the amount of $3,000,000, of which there have been issued $1,204,000.00.

186 That the said mortgage embraces and covers a line of railroad, with equipments and appurtenances as described in said mortgage, commencing at the Mississippi river at West Quincy, in the State of Missouri, and extending through the counties of Lewis, Knox, Adair, and Sullivan to or near the town of Trenton, in Grundy county, the entire line of said railroad being in the State of Missouri.

That default has been made in the payment of certain coupons attached to said bonds and representing the interest that accrued thereon on the first day of July, 1884, amounting to $36,120.00; and the coupons attached to said bonds and representing the interest that accrued thereon on the first day of January, 1885, amounting to $36,120.00; and the coupons attached to said bonds and representing the interest that accrued thereon on the first day of July, 1885, amounting to $36,120.00, all of which said interest remains wholly unpaid.

That by the terms of said mortgage it is provided that if the interest on said bonds should remain unpaid for the period of six months after proper demand of payment thereof, then, upon the written request of the holders of one-half of said bonds, the said trustees should declare the principal of said bonds to be due, and should have the right to enter upon and take possession of said mortgaged property, to hold and use and sell the same for the purpose of paying the principal and interest of said bonds.

That proper demand of payment of said coupons has been made, and said trustees have, upon the written request of the holders of a majority of said bonds, declared the principal of said bonds to be due.

That at the time of the appointment of the receivers herein
187 the said mortgaged property was operated by the Wabash, St. Louis and Pacific Railway Company under a certain indenture of lease wherein it provided that in the event that by the failure on the part of the lessee company to pay the interest on said mortgage bonds the principal of said bonds shall become due the same shall, at the option of the lessor company, work a forfeiture of said lease, and thereupon the lessor company, by its officers, agents, or committee, shall be entitled to re-enter and take possession of all and singular the said mortgaged property.

That pursuant to the provision of said lease the said Quincy, Missouri and Pacific Railroad Company has exercised the option therein given it to enforce the forfeiture of said lease for non-payment of rent, whereby said lease has become and is totally void, and said trustees are entitled to the possession of said property under and by virtue of the provisions of said mortgage and lease.

And the said Gilman and Bull, trustees, having prayed the court for an order directing the receivers to surrender to them, as such trustees as aforesaid, the possession and control of the said railroad and property embraced in and covered by said mortgage, to be managed and operated as provided in said mortgage, and they be hence dismissed; and the receivers appointed by this court and the Central Trust Company of New York and James Cheney, of Indiana, trustees under the consolidated mortgage mentioned in the bill and exhibits filed in this cause, and the Wabash, St. Louis and Pacific Railway Company, being represented in open court by their several solicitors and being duly advised of said motion, and the court having fully considered the same and being advised in the premises—

It is ordered, adjudged, and decreed that the receivers do, on or before August 1st, 1885, transfer and surrender to the said
188 trustees, Gilman and Bull, the entire line of railroad above described and known as the Quincy, Missouri and Pacific Railroad Company, and also all property, real and personal, pertaining to the said railroad and now in their possession or under their control: Provided that as to any rolling stock or other personal property that may be at such a distance that it cannot be easily delivered the receivers shall have a further period of thirty days within which to gather such property and rolling stock and deliver the same to said trustees.

And this order shall be without prejudice to the rights, if any, of said Quincy, Missouri and Pacific Railroad Company or said trustees, Gilman and Bull, against said receivers for the collection of any moneys for which they or the fund or property in their hands may be liable for or on account of the earnings of the said mortgaged property during said receivership or for rental under the lease thereof or for the recovery of any equipment, rolling stock, or personal property which may have come into the possession of such receivers or for the conversion or use thereof.

But neither this order nor anything done in pursuance thereof shall in any manner affect or impair the jurisdiction or power of

this court to determine any and all questions as to what, if any, portion of any existing indebtedness of the Wabash, St. Louis and Pacific Railway Company or of Solon Humphreys and Thomas E. Tutt, as receivers of the property of said last-named company, should be charge- upon or enforced as a lien prior to all mortgages against said Quincy, Missouri and Pacific railroad or as a first lien upon or against the income and revenue thereof, and the said Quincy, Missouri and Pacific Railroad Company and the said Gilman and Bull and the successor or successors of them and each of them, as well as each and every person coming into or having
189 possession of said Quincy, Missouri and Pacific railroad or any part thereof, under this order, as the same is herein described, shall enter their appearance in this action whenever ordered or required by this court so to do, not generally but specially, for the purpose of adjusting the accounts between said property and the Wabash, St. Louis and Pacific Railway Company or its receivers or of apportioning the indebtedness aforesaid among the different divisions or lines of railroad formerly owned or operated by the Wabash, St. Louis and Pacific Railway Company; and said parties and each of them shall abide and perform whatever orders, judgments, or decrees may be made by this court in said cause touching the matters aforesaid; but any party considering himself aggrieved by any final order, judgment, or decree touching the adjustment of said accounts or the charging or apportioning of said indebtedness may appeal therefrom as in ordinary cases.

On the 6th day of January, 1886, said consolidated cause came on for final hearing before said court, and the following decree of foreclosure and sale was entered, to wit:

190 In the Circuit Court of the United States for the Eastern District of Missouri, September Term, A. D. 1885. In Equity.

THE CENTRAL TRUST COMPANY OF NEW YORK and Others *against* THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY and Others.	Nos. 2357 and 2464. Consolidated Cause.

Decree of Foreclosure and Sale, January 6th, 1886.

Now, on this day, came the following parties, by their solicitors, namely:

The Central Trust Company of New York, James Cheney, The Wabash, St. Louis & Pacific Railway Company, The Mercantile Trust Company of New York, The St. Louis, Iron Mountain
191 & Southern Railway Company, Solon Humphreys, John T. Terry, and all the other defendants who have answered the bill of the Central Trust Company of New York and James Cheney or the bill filed by the said complainants in the State court and removed to this court, or the cross-bill filed by the Mercantile Trust Company of New York, viz:

1. Anthony J. Thomas, } As trustees of the Cairo division.
2. Charles Edward Tracy, }
3. United States Trust Company of New York.
4. Quincy, Missouri & Pacific Railroad Co.
5. Charles H. Bull.
6. Amos Green.
7. Henry F. Spaulding.
8. St. Joseph & St. Louis Railroad Co.
9. St. Louis Bridge Co.
10. The Tunnel Railroad of St. Louis.
11. St. Louis, Council Bluffs & Omaha Railroad Co.
12. James B. Eads.
13. Joseph A. Jamison.
14. Charles Parsons.
15. Isaac H. Knox.
16. Geo. E. Leighton.
17. Louis H. Meyer.
18. Michigan City & Indianapolis Railroad Co.
19. William Nichols.
20. Geo. S. Coe.
21. Indianapolis, Peru & Chicago Railway Co.
22. German Savings Institution.
23. Boone County and Booneville Railway Co.
24. Brunswick & Chillicothe Railway Co.

192 25. Geo. M. Rice.

26. Edward P. Burnham.
27. John Kimball.
28. Chicago, Cincinnati & Louisville Railroad Co.
29. Clarinda & St. Louis Railroad Co.
30. Geo. I. Seney.
31. Geo. T. M. Davis.
32. Des Moines Northwestern Railway Co.
33. Farmers' Loan and Trust Co.
34. Henry W. Ford.
35. Richard S. Brock.
36. J. P. Giraud Foster.
37. Edward K. Goodnow.
38. John M. Woodson.
39. Robert A. Betts.
40. Alexander M. White.
41. Henry H. Worden.
42. James R. Jesup.
43. John N. A. Griswold.

And it appearing to the court that all the defendants to the bills of complaint aforesaid have entered their appearance herein or have been duly served with process herein or have been notified of the pendency of this cause by personal service or by publication, as heretofore ordered by the court, such service of process or notice being given and such publication having been made more than twenty days before the first Monday of October, A. D. 1885;

It also appearing to the court that the following trustees have either resigned their trusts or departed this life, namely:

1. Edwin D. Morgan.
2. H. F. Vail.
3. O. H. Browning.
4. Abram W. Hendricks.
5. Lucien Tilton.

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The court finds that the trusts represented by the parties above named as having resigned their trusts or departed this life are fully represented in this cause, or that such trusts will not be affected by this decree.

The court also finds that of the parties defendant served with process or notified as aforesaid a large number have been defaulted more than a month before the rendition of this decree, and the original and removed bills of the Central Trust Company and James Cheney taken for confessed against them and each of them, viz:

1. John R. Lionberger.
2. Attica, Covington and Southern R. R. Co.
3. Champaign and Southeastern R'y Co.
4. Havana, Rantoul and Eastern R. R. Co.
5. Des Moines and St. Louis R. R. Co.
6. Council Bluffs and St. Louis R'y Co.
7. Humeston and Shenandoah R. R. Co.
8. St. Louis, Ottumwa and Cedar Rapids R. R. Co.
9. Alfred T. White.
10. Daniel A. Lindley.
11. Wager Swayne.
12. Clifford A. Hand.
13. Robert C. Martin.
14. George J. Gould.
15. John Paton.
16. David J. Tyson.
17. Charles E. Whitehead.
18. William Hill.
19. Theodore Gilman.
20. Edward De Rose.

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21. Henry A. Mott.
22. Charles Jackson.
23. G. M. Whittemore.
24. James H. Britton.
25. Townsend Underhill.
26. William H. Ladd.
27. J. C. Rogers.
28. Benjamin Ham.
29. Archibald Hopkins.
30. James Compton.
31. Abram W. Hendricks.
32. Thomas B. Coulter.
33. Thomas Mayo.
34. Philip Henry Brown.
35. Metropolitan National Bank.

36. Eel River R. R. Co.
37. Toledo, Peoria & Western R. R. Co.
38. St. Louis, Jerseyville & Springfield R. R. Co.
39. Peoria & Pekin Union R. R. Co.
40. Chicago & Western Indiana R. R. Co.
41. Chicago, St. Louis & Pittsburg R. R. Co.
42. Hannibal Bridge Co.
43. Missouri, Iowa & Nebraska R. R. Co.

The court finds and adjudges that because the bills so filed by the Central Trust Company and James Cheney and the cross-bill filed by the Mercantile Trust Company of New York cover and embrace all the rights and equities upon which the property hereinafter described can or ought to be sold by decree or decrees of this court in
195 this cause, it will not be necessary to found this decree on the original or amended bills of the Wabash, St. Louis & Pacific Railway Company or the prayers thereof, but said last-named bills will be retained by the court for the purpose of adjusting all such rights as have arisen under the same, but not for the purpose of foreclosing under the prayers thereof any of the instruments hereinafter described.

And now this cause coming on for final hearing on the original removed bill and cross-bills of the Central Trust Company of New York (to be called hereafter the Central Trust Company for the sake of brevity) and James Cheney, the cross-bill of the Mercantile Trust Company, the answer of the Wabash, St. Louis & Pacific Railway Company (to be called hereinafter the Wabash Company for the sake of brevity), and all other answers to the above bills of parties appearing of record, with all replications, exhibits, reports of masters or commissioners to whom any of the questions or issues herein presented were referred, and also all evidence taken in said cause relating to said questions and issues, and all replications of the parties or any of them, and also upon the default of all parties who have suffered default as aforesaid;

And the court, having heard the arguments of counsel and being fully advised in the premises, finds and adjudges:

On the first day of June, A. D. 1880, the Wabash Company was a body corporate formed by the consolidation of certain other corporations organized under the laws of the States of Ohio, Indiana, Illinois, and Missouri, and that said company then owned
196 certain lines of railroad formerly owned by other bodies or parties, with all the property, real and personal, and all the franchises thereof; that said Wabash Company was then acquiring or in contemplation of acquiring still other lines of railroad, with the property and franchises thereof, by lease, consolidation, or otherwise, all of which lines so owned or held or so about to be acquired will be more fully described hereinafter.

On the first day of June, A. D. 1880, the said Wabash Company, for the purpose of securing an intended issue of its mortgage bonds to the amount of fifty millions of dollars (to be known as "general mortgage bonds"), and the payment of the principal and interest thereof, duly executed and delivered to the Central Trust Company

of New York and James Cheney, of Indiana, as trustees, its mortgage or deed of trust (known as "the general mortgage"), and thereby conveyed to said trustees, for the purpose in said general mortgage fully set forth, certain lines of railroad and certain interests as the same then existed or might thereafter exist in and to certain other lines of railroad, with all the property and franchises, rights, income, and choses in action pertaining thereto. The lines of railroad and property and interest specifically described and defined in said mortgage (such description being hereby adopted) and the extent of the lien thereby created as against certain other liens are set forth in said mortgage as follows, such enumeration, however, not embracing other lines of railroad afterwards acquired by the Wabash Company and to which the lien of said general mortgage afterwards attached:

197 "All of the right of way and railroad of the said first party extending from the city of Toledo, in the State of Ohio, through the State of Indiana, and thence into the State of Illinois to Meredosia, with branch of said road to Naples and East Hannibal, and from Meredosia to Camp Point, in the State of Illinois, and with branch of said road from Clayton to the east bank of the Mississippi river at Hamilton, in said State, and with branch of said road leading from Decatur, in said State, to East St. Louis, in the same State, and also the railway of the party of the first part extending from St. Louis, in the State of Missouri, in a northwesterly direction to Kansas City, Missouri, with a lateral extension from Moberly, in the county of Randolph, to Ottumwa, in the State of Iowa, and a branch from Salisbury, in the county of Chariton, State of Missouri, to Glasgow, in the county of Howard, in said State, and also an extension from Brunswick, in said county of Chariton, in a northwesterly direction to the city of Council Bluffs, in the State of Iowa, which lines of railroad will, when united, form one continuous line of railway in the same general direction from the waters of Lake Erie, at Toledo, Ohio, to the cities of Council Bluffs and Kansas City, on the Missouri river, as aforesaid, together with all the embankments, bridges, tournouts, side tracks, buildings, and structures, water tanks and fixtures, shops, engine and other houses, depots, turn-tables, engines, cars, machinery, tools, ferry and other boats, and every other thing appurtenant to said railroad or used in connection therewith belonging to the said first

198 party, together with all rents, issues, and profits, credits, and choses in action accruing to said first party from said railroad and appurtenances, as owner and holder thereof.

"And the said Wabash, St. Louis and Pacific Railway Company, in consideration of the premises above recited and for the further security of the bonds above described, does hereby grant, bargain, sell, assign, transfer, and convey unto the Central Trust Company of New York and James Cheney, trustees, their heirs and successors in said trust, all the right, title, and interest of said first party as the same now exists or may hereafter exist by virtue of any contract, lease, purchase, or consolidation in and to the following-described railroads now in process of amalgamation with the railroad

of the said first party, including with said railroads every appurtenance thereto or thing used in connection therewith, and all rents, issues, and profits arising therefrom to the said first party; all the above as fully as above described with reference to the railroad now owned and held by said first party and as fully as it is or may be possible for said first party to convey the same.

"The Boone County and Booneville railway, extending from Centralia to Columbia, in the State of Missouri.

"The St. Louis, Ottumwa and Cedar Rapids railway, extending from Moberly, in the State of Missouri, to Ottumwa, in the State of Iowa.

199 "The St. Joseph and St. Louis railway, extending from New Lexington and Richmond and Lexington Junction to St. Joseph, in the State of Missouri.

"The Brunswick and Chillicothe railway, extending from Brunswick to Chillicothe, in the State of Missouri.

"The St. Louis, Council Bluffs and Omaha railway, extending from Chillicothe to Elm Flats, in the State of Missouri.

"The Chicago and Paducah railway, extending from Effingham and Altamont to Streator, in the State of Illinois.

"The Chicago and Strawn railway, extending from Strawn to Chicago, in the State of Illinois.

"The Eel River railway, extending from Logansport to Butler, in the State of Indiana.

"The Quincy, Missouri and Pacific railway, extending from West Quincy, in the State of Missouri, to the Missouri river opposite Brownsville, Nebraska.

"The Missouri, Iowa and Nebraska railway, extending from Keokuk, Iowa, to a junction with the Omaha division of the Wabash, St. Louis and Pacific railway, near the line between the State of Iowa and the State of Missouri.

"The Champaign, Havana and Western railway, extending from Champaign to Havana, in the State of Illinois, and from White Heath to Decatur, in the State of Illinois.

"The Toledo, Peoria and Western railway, extending from Warsaw, in the State of Illinois, to the State line of Indiana, and
200 from La Harpe, in the State of Illinois, to Burlington, in the State of Iowa.

"The Detroit, Butler and St. Louis railway, from Butler, in the State of Indiana, to Detroit, in the State of Michigan; to have and to hold the said property, real and personal, including the said railroads, appurtenances, equipment, franchises, rights, credits, and choses in action, and every interest herein granted *that* the said trustees, as joint tenants and not as tenants in common, and the survivor of them, his heirs and successors, but in trust, nevertheless, for the use and purposes herein declared and for the purpose of protecting and securing the holders of said fifty thousand bonds and each and every of them, and upon the conditions following—that is to say:

"The estate hereby conveyed and the lien of the trust hereby created shall be expressly subject and inferior to all such prior liens

above referred to as are charged upon the several portions of the railroad and equipment of the railroad now of said first party and to the estate and lien of such specific trusts and mortgages or other obligations as may be hereafter made and charged by the said first party upon specific property which said first party hereafter may acquire, and shall form part of the purchase-money or condition of the acquisition of the property so charged by said first party."

The court further finds and adjudges that in addition to the lines of railroad specifically described in said general mortgage
201 the lien thereof also attached to all the right and title of the Wabash Company in and to all the following railroads, property, franchises, rights, and interests, whether acquired before or after the execution of the said general mortgage and whether acquired by purchase, lease, or consolidation or contract, viz:

The Clarinda and St. Louis railway, being 10.1 miles long in the State of Missouri and 11.7 miles in the State of Iowa, making a railroad 21½ miles in length, extending from Clarinda, Iowa, to Roseberry, Missouri. Said Wabash Company acquired title in fee to the Missouri portion of said railroad and a leasehold title to the remainder.

The Peoria, Pekin and Jacksonville railroad, extending from Pekin, Illinois, to Jacksonville, Illinois, a distance of 72.2 miles, said railroad having been acquired by purchase July 25, 1881.

The Springfield and Northwestern railroad, extending from Springfield, Illinois, to Havana, Illinois, a distance of 44.1 miles, said railroad being acquired by purchase July 30, 1881.

The Centreville, Moravia and Albia railroad, extending from Centreville, Iowa, to Albia, Iowa, a distance of about 25 miles. Said railroad was leased to the Missouri, Iowa and Nebraska Railroad Company and came to the Wabash Company with the property of said last-named company.

The Des Moines and St. Louis railroad, extending from Des Moines, in the State of Iowa, to Albia, in said State, through the counties of Polk, Marion, and Monroe, in said State, a dis-
202 tance of 67.3 miles, leased to the Wabash Company on the first day of March, 1882.

The St. Louis, Jerseyville and Springfield railroad, extending from Grafton, Illinois, to a point near Bates, Illinois, a distance of 71.4 miles. Said railroad was acquired by lease August 6, 1881.

The Attica, Covington and Southern railroad, extending from Attica, Indiana, to Covington, Indiana, a distance of 14½ miles, leased to said Wabash Company July 18, 1881.

The Michigan City and Indianapolis railroad, extending from Michigan City to La Porte, Indiana, a distance of 12.75 miles, leased to the Wabash Company June 1st, 1881.

The Indianapolis, Peru and Chicago railroad, extending from Indianapolis, Indiana, to Peru, Indiana, a distance of 75 miles, leased to said Wabash Company June 1st, 1881.

The Braidwood branch, being a line ten and nine-tenths miles long, extending from near Braidwood, Illinois, to the Chicago branch of the Wabash railroad. Said branch is partially constructed and

was built by moneys arising from the sale of general mortgage bonds aforesaid.

The Champaign and Southeastern railroad, extending from Champaign, Illinois, to Sidney, Illinois, a distance of 11.6 miles, which was leased by the Wabash Company March 1st, 1882.

The Madison County railroad, extending from Edwardsville, Illinois, to its junction with the Chicago and Alton railroad, a distance of 8.5 miles, acquired by the Wabash Company by purchase.

203 The Humeston and Shenandoah railroad, extending from Humeston to Shenandoah, Iowa, a distance of 113 miles, in which the Wabash Company owns a one-half interest.

Certain real estate and terminal privileges in Burlington, Iowa, more particularly described in mortgage hereinafter referred to.

The bridge over the Mississippi river at St. Louis, with the tunnel and terminal rights in said city, leased by said Wabash Company and the Missouri Pacific Railway Company, as set forth in a certain lease hereinafter referred to.

The bridge over the Mississippi river at Hannibal, Missouri, leased by the two last-named companies, as set forth in a lease hereinafter referred to.

Certain right of use of the bridge over the Missouri river at Kansas City, Missouri, held under a lease or contract with Hannibal and St. Joseph Railroad Company hereafter referred to.

The right to use certain tracks and terminal facilities in Cook county, Illinois, and in Chicago, Illinois, under lease or contract with the Chicago and Western Indiana Railroad Company hereinafter referred to.

The right to use certain tracks and terminal facilities owned by the Peoria and Pekin Union Railway Company in Illinois under contract with said last-named company, dated February 1st, 1881, hereafter referred to.

204 The right to use certain tracks and depot facilities in the union depot in Kansas City, Missouri, under contract with the Kansas City Depot Company, dated June 1st, 1876, hereinafter referred to.

The right to use certain tracks and depot facilities in the union depot in Hannibal, Missouri, under contract with Hannibal Depot Company, dated June 30, 1881, hereinafter referred to.

The right to use certain tracks and depot facilities in the union depot in St. Joseph, Missouri, under contract with St. Joseph Union Depot Company, dated September 2, 1880.

The right to use certain tracks and depot facilities in the union depot at Detroit, Michigan, under contract, October 20, 1881, hereinafter referred to.

The right to use certain tracks extending from Clayton, Illinois, to Quincy, Illinois, and certain depot and station facilities in said last-named city, said right arising under a contract or lease, dated January 1st, 1878, between the Chicago, Burlington and Quincy Railway Company and said Wabash Company.

An interest in the elevator company at Council Bluffs, Iowa, upon which a payment to the amount of $41,666.66 has been made

by the Wabash Railway Company, for which no certificate has been issued.

Three hundred coal cars acquired from the National Rolling Stock Company November 23d, 1883, under an agreement to pay mileage on the same, with privileges of purchase at end of any one year, etc.

The following tracts or parcels of land, the title to which
205 was taken in the name of James F. How, as trustee, before the appointment of receivers in this cause:

Marion county, Iowa:

Lot 6, subdiv. of S. 7, T. 77, R. 21.

In the city of Chicago, State of Illinois:

In the Assessors' div. of N. W. ¼ of W. ½ N. E. ¼, sec. 32, T. 39 N., R. 14 east; block 13.

In Brown's addition in the N. E. ¼, sec. 32, T. 39 N., R. 14 E.; lot 8, in block 3; lots 8, 9, 43, 44, in block 4.

Gallaher's subdiv. of the S. ½ of block 9, in Canal Trustees' subdiv. of sec. 33, T. 39 N., R. 14 east.

Lots 19, 20, and 28, in block 2; lots 24, 34, 31, and 32, in block 1.

T. J. Foster's subdiv. of the part of block 10, Canal Trustees' subdiv., sec. 33, T. 39 N., R. 14 east.

Lots 1 and 37, in bl'k 1, and lots 1 and 37, in bl'k 2.

Guno's subdiv. of part block 10, Canal Trustees' subdiv., sec. 33, T. 39 N., R. 14 east; lot 47.

Canal Trustees' subdiv. of sec. 33, T. 39 N., R. 14 E.; S. W. part 364.6 and 480 ft. of block 12.

Sutton's subdiv. of bl'k 28 of Canal Trustees' subdiv., S. 33, T. 39 N., R. 14 E.

Lots 5, 44, and 45, in block 2.

In Assessors' div. of bl'k 11 of Canal Trustees' subdiv., sec. 33, T. 39 N., R. 14 E.

Lots 61 and 62, in block 11.

In the city of St. Joseph, State of Missouri:

In South St. Joseph addition to said city—

Lots 1, 2, 3, 4, 5, 6, and 7, in block 56; lots 1, 2, 3, 4, 5, 6, and 7, in block 57; lots 5, 6, and 7, in block 58; lots 12, 13, and 14, in block 55.

206 In the city of St. Louis, State of Missouri:

In Scott's addition to said city—

Lots 25, 26, 1, 2, 36, 33, and four feet and eight inches of lot 32 of block 6.

The court also finds and adjudges that the Wabash Company acquired title to the following lines of railroad, with all the franchises and property, real and personal, and all choses in action, rights, incomes, revenues, and credits pertaining thereto or used in connection therewith by the use of the general mortgage bonds aforesaid, and

that said lines, rights, property, and interests were purchased by said company with said general mortgage bonds, viz:

The Peoria, Pekin and Jacksonville railroad, hereinbefore described.

The Springfield and Northwestern railroad, hereinbefore described.

The Braidwood branch, hereinbefore described.

It is adjudged that as to all property, rights, interest, and choses in action acquired by the Wabash Company after the execution of said general mortgage, whether described in the same or not (except such as are herein otherwise adjudged and such as pertain to railroads not herein declared to be subject to the general mortgage), the lien of said mortgage attached and is now in force.

It is, however, adjudged that the said general mortgage on the property of the Wabash Company did not attach to or become
207 a lien on the railroad or property of the Havana, Rantoul and Eastern Railroad Company.

The court finds that said mortgage was duly recorded as required by law, and for all the contents and provisions thereof and for the terms and provisions of the bonds secured thereby and the coupons attached thereto reference is hereby made to a true copy of said mortgage, filed by said Wabash Company with its original and amended bills in this cause, marked Exhibit "B," and commencing on page 1 of volume 1 of the printed volume of exhibits.

The court further finds and adjudges that afterwards, on the first day of May, A. D. 1883, for the purpose of securing an intended issue of its bonds (called collateral trust bonds), amounting to ten millions of dollars, said Wabash Company executed and delivered to the Mercantile Trust Company of New York, as trustee, a certain other indenture, called and known as "the collateral trust," and thereby assigned and transferred to said last-named company, for the purposes of said trust, all the bonds, stocks, cars, steamboats, rolling stock, and interest in real estate specified in said instrument, and then and there delivered all said bonds, stocks, and evidences of title to said trustee.

And for the terms and conditions of said collateral trust and of the bonds and coupons intended to be secured thereby reference is hereby made to a true copy thereof, filed by said Wabash Company with its original and amended bills herein, marked Exhibit "D," appearing in said printed volume 1 of exhibits, beginning on page 33.

208 The court finds and adjudges that at the time of the execution of the collateral trust the said Wabash Company transferred and delivered to the Mercantile Trust Company, trustee under said instrument, certain stocks, bonds, assignments, bills of sale, and other evidences of title to property, real and personal, pledged in and by said collateral trust, and that said stocks, bonds, assignments, bills of sale, and other evidences of title were as follows, this decree adopting the description given in said instrument and the preamble by which said description is introduced therein:

"Whereas the Wabash, St. Louis and Pacific Railway Company

has deposited with the Mercantile Trust Company of New York assignments, bills of sale, or other evidences of title to the following-described bonds, shares, real estate, and other property, viz:

"$46,000 Union Bridge Company bonds;

"$1,342,000 Humeston and Shenandoah Railroad Company first-mortgage 7 per cent. bonds;

"1,000,000 Wabash, St. Louis and Pacific Railway Company general mortgage six per cent. bonds;

"$400,000 Wabash Railway Company mortgage seven per cent. bonds of 1879;

"$199,000 Wabash, St. Louis and Pacific Railway Company, Detroit division, six per cent. bonds;

"248,000 Quincy, Missouri and Pacific Railroad Company income bonds;

"$1,711,000 Toledo, Peoria and Western Railroad Company first preferred income bonds;

"$728,000 Toledo, Peoria and Western Railroad Company second preferred income bonds;

209 "13,404 shares Toledo, Peoria and Western Railroad Company;

"10 shares St. Joseph union depot;

"210 shares Union Depot Company of Kansas City, Missouri;

"10 shares Hannibal Union Depot Company;

"5,187 shares Des Moines Northwestern Railway Company;

"2,214 shares Havana, Rantoul and Eastern Railroad Company;

"9,996 shares Des Moines and St. Louis Railroad Company;

"20,127 shares Humeston and Shenandoah Railroad Company;

"21,534.96 shares Missouri, Iowa and Nebraska Railway Company;

"9,000 shares St. Louis, Jerseyville and Springfield Railroad Company;

"2,030 shares Clarinda and St. Louis Railroad Company;

"14,246 shares Quincy, Missouri and Pacific Railroad Company;

"5,380 shares St. Louis, Ottumwa and Cedar Rapids Railway Company;

"11,089 shares Council Bluffs and St. Louis Railway Company;

"7,281 shares St. Louis, Council Bluffs and Omaha Railroad Company;

"4,332 shares Brunswick and Chillicothe Railroad Company;

"2,687 shares Centreville, Moravia and Albia Railroad Company;

210 "750 shares Attica, Covington and Southern Railway Company;

"1,665 shares American Refrigerator Transit Company of Illinois;

"60 shares Union Bridge Company of Toledo, Ohio;

"17 shares St. Louis County Railroad Company;

"4,994 shares Peoria and Pekin Union Railway Company.

"9,999 shares Chicago and Western Indiana Railroad Company;

"12,500 shares St. Louis Bridge Company common stock;

"1,160 shares St. Louis and Mississippi Valley Transportation Company;

"Steamers now on Lake Erie known as the 'Russel Sage,' 'John C. Gault,' 'A. L. Hopkins,' and 'Morley;'

"15 locomotives manufactured by the Rhode Island locomotive works;

"13 passenger cars manufactured by Barney, Smith & Co.;

"5 baggage cars manufactured by Barney, Smith & Co.;

"1,210 freight cars manufactured by Barney, Smith & Co.;

"All the right, title, and interest of said party of the first part in and to certain rolling stock, being all the rolling stock mentioned and described in certain agreements between the party of the first part and the New York and Pacific Car Trust Association."

211 But the court finds that of the stock of the Des Moines Northwestern Railway Company the said Mercantile Trust Company now holds only 5,037 shares subject to said mortgage.

The said collateral trust also embraced and attached to certain real estate therein referred to, situate in the county of Cook and State of Illinois, held in trust for said Wabash Company by Solon Humphreys, and which the court finds was conveyed to said Solon Humphreys alone in trust for said Wabash company; said real estate is more particularly described as follows:

The whole of lots 1 and 2, in block 9.

The whole of lots 3 and 4, in block 9.

The whole of lots 5 and 6, in block 9.

All in Springer and Fox addition to the city of Chicago, in Cook county, State of Illinois.

Also Assessors' division of the N. W. ¼ and W. ½ N. E. ¼ section 32, town. 39 N., range 14 east, all lying east of the South branch of the Chicago river, of latitude 32, and all being in the county of Cook aforesaid.

It is further found and adjudged by the court that of the general mortgage bonds intended to be issued as aforesaid there were in fact issued and are now outstanding and unpaid a number thereof, the principal of which amounts to seventeen million dollars, and that there is due for interest thereon and upon coupons attached thereto since the latter matured the further sum of two millions one hundred and thirty-two thousand seven hundred and fifty-three dollars and forty cents up to December 1, 1885, of which num-

212 ber sixteen millions of dollars were sold for value and the remaining one million were hypothecated to the Mercantile Trust Company of New York as trustee in the collateral trust mortgage and now held subject to said trust; and reference is hereby made to the report of the special master to whom was referred the matter of taking proof as to the number and amount of said bonds now outstanding, the amount of principal and interest due thereon, and the names of the parties owning and holding the same as far as now known.

The court further finds that the Wabash Company, on the first day of June, A. D. 1884, made default in the payment of all the interest which became due on said bonds on said day, and that such

default has continued ever since that time; that said company also made default in the payment of all installments of interest maturing on said bonds since said first day of June, A. D. 1884, and that all such defaults have continued ever since.

The court finds further that demand was duly made by the holders of a large number of said bonds and coupons, at the office of said Wabash Company, in the city of New York, for the payment of the interest maturing thereon on the first day of June, A. D. 1884, such demand being made on or after said day, and payment was then and there refused.

That in the month of December, 1885, after the said default had continued for more than six months after the maturity of said coupons on the first day of June, 1884, and the demand made for the payment thereof as aforesaid, the holders of more than a
213 majority in value of all the general mortgage bonds then outstanding and secured by said general mortgage determined that they required the principal of all said bonds then outstanding to become at once due and payable and so notified the trustees named in said mortgage, and also gave notice in writing to said trustees of their having so determined, and thereby required said trustees to exercise the powers conferred on them by said mortgage to enforce the payment of the indebtedness and to proceed to foreclose the said mortgage by judicial decree.

It is therefore adjudged and decreed by the court that the principal sums specified in the general mortgage bonds aforesaid, as well as the interest thereon, have now become due and payable according to the terms and conditions of said instrument.

The court, being fully advised, also finds and adjudges that of the collateral trust bonds aforesaid there were issued and either sold for value or so pledged as to entitle the parties holding the same to the proceeds thereof and the security created therefor as aforesaid the whole amount of ten million of dollars of principal; that there is due thereon to Dec. 1, 1885, the additional sum of $1,109,268.80 as interest on said bonds and on coupons attached thereto since the maturing of such coupons.

That the Wabash Company made default in the payment of interest maturing on said collateral trust bonds on the first day of May, A. D. 1884, and on each installment of interest maturing since that time; that demand was duly made for the payment of interest maturing as aforesaid on the first day of May,
214 A. D. 1884, at the office of the Wabash Company in the city of New York, by the holders of a large number of said bonds and coupons, such demand being made on and after said first day of May, 1884; that after said default had been so made and after the demand aforesaid the holders of more than twenty-five per cent. of all said collateral bonds then outstanding, in writing, requested the Mercantile Trust Company aforesaid to proceed under the power contained in said indenture to sell all or a sufficient amount of the securities in said collateral trust mentioned to produce a sum sufficient to pay all the principal and interest of said entire issue of said bonds; that due notice of such request and of the purpose of said

trustee to comply therewith was given to the Wabash Railway Company more than sixty days before said Mercantile Trust Company filed its cross-bill herein; but that all said property embraced in said collateral trust being under the control of this court, said trustee did not exercise its power of sale, but filed its cross-bill for the foreclosure of said instrument as a mortgage. The court therefore adjudges and decrees that the holders of said collateral trust bonds are now entitled to have the property embraced in said collateral trust sold and the proceeds applied to the payment of both the principal and interest of said bonds.

And for the number of said collateral trust bonds now outstanding and the names of the persons owning or holding the same reference is hereby made to the report of the master to whom said matter was referred by order of court.

215 The court further adjudges that upon the execution and recording of the general mortgage aforesaid the same became and was and still is a lien on the lines of railroad, franchises, interests, and property described in said mortgage as having been conveyed to said trustees at the time of the execution thereof, and that the said mortgage also became a lien on all the right, title, and interest of the Wabash Company in and to all such other lines of railroad, with all their property, rights, and franchises, as are described in said mortgage as being then in course of amalgamation with the property of said Wabash Company. The said last-mentioned lien attached to each of said lines of railroad, with the franchises and property thereof, to the extent of the interest and title of the Wabash Company therein, whether acquired at the time of the execution of the said mortgage or after that time.

The court also adjudges as aforesaid that the Wabash Company, before or after the execution of said general mortgage by lease, consolidation, purchase, or contract, acquired title to or interests in certain other lines of railroad, franchises, or property not specifically described in said general mortgage, but hereinbefore referred to; that the lien of said general mortgage under the terms and provisions thereof attached to all of said railroads, franchises, property rights, choses in action, and interests to the extent of the title and interest of the Wabash Company therein; but the court adjudges that the lien so created on any line of railroad, franchises, interests, or property acquired by the Wabash Company after the execution of said general mortgage was and is subject to any lien, prior

216 or subsequent thereto, created to secure the purchase-money of said railroad, franchise, property, or interest, or to secure the performance of any condition on which said Wabash Company acquired the same.

It is further adjudged that at the time of the execution of said collateral trust and the delivery of the stock, bonds, assignments, bills of sale, and other evidence of title to the property embraced therein by the Wabash Company to the Mercantile Trust Company as trustee said instrument became a lien on all the right, title, and interest of said Wabash Company in and to all the property, rights,

and interests embraced in said collateral trust in favor of all owners and holders of said bonds, and that said lien is still in force.

It is further ordered and adjudged that this decree or any sale made thereunder shall not in any way prejudice or affect the rights of parties to or persons interested in certain mortgages, deeds of trust, leases, and contracts hereinafter set forth, but all the rights of such persons and parties are hereby reserved to them. The deeds of trust, mortgages, leases, and contracts in regard to which such reservation is made are as follows:

A mortgage or deed of trust to secure the principal and interest of bonds amounting to $900,000, with interest thereon at the rate of 7 per cent. per annum, executed by the Toledo and Illinois Railroad Company to the Farmers' Loan and Trust Company as trustee. Said mortgage became a lien on that portion of said railroad extending from Toledo, Ohio, to the Indiana State line, a distance of 75.5 miles. The said interest was paid up to August 1st,
217 1884, except that represented by certain coupons funded under an agreement made in 1877.

A mortgage, dated August 1st, 1853, executed by the Lake Erie, Wabash and St. Louis Railroad Company to the Farmers' Loan and Trust Company as trustee, to secure bonds amounting to $2,500,000, with interest at the rate of 7 per cent. per annum. Said mortgage became a lien on that portion of the railroad of the Wabash, St. Louis and Pacific Railway Company extending from the western boundary of the State of Ohio at the western terminus of the Toledo and Illinois railroad to the eastern boundary of Illinois, a distance of 166.1 miles.

A deed of trust, dated October 15, 1858, executed by the Toledo and Wabash Railroad Company to Edwin D. Morgan as trustee, to secure bonds amounting to $1,000,000, with interest thereon at the rate of 7 per cent. per annum. Said deed of trust became a lien on that portion of said railroad extending from Toledo, Ohio, to the eastern boundary of the State of Indiana, all lying within the State of Ohio.

A deed of trust, dated October 15, 1858, executed by the Wabash and Western Railway Company to Edwin D. Morgan as trustee, to secure the payment of bonds amounting to $1,500,000, with interest thereon at 7 per cent. per annum. Said deed of trust became a lien on all the said line of railroad in the State of Indiana extend-
218 ing from the west line of the State of Ohio to the east line of the State of Illinois, a distance of 166.1 miles.

A deed of trust, dated May 25, A. D. 1863, executed by the Great Western Railroad Company of 1859 to George Griswold, Alexander M. White, and Henry Worden as trustees, to secure bonds amounting to $2,496,000, with interest thereon at the rate of 7 per cent. per annum; that said mortgage became a lien on all said lines of railroad extending from Meredosia and Naples, in the State of Illinois, to the eastern boundary of Illinois, being 180.7 miles in length.

A deed of trust, dated May 11, A. D. 1865, executed by the Great Western Railway Company of 1859 to Solon Humphreys and James R. Jessup, to secure bonds amounting to $2,500,000, with in-

terest thereon at the rate of seven per cent. per annum; which said deed of trust became a lien on all that portion of railroad last above described.

A deed of trust, dated March 1st, 1862, executed by the Illinois and Southern Iowa Railroad Company to John N. A. Griswold, James R. Jessup, and Lucien Tilton as trustees, which became a lien on all that portion of the railroad aforesaid extending from Carthage, Illinois, to Clayton, Illinois, a distance of 29.1 miles, said mortgage being executed to secure bonds amounting to
219 $300,000, with interest at six per cent. per annum, said interest being paid up to August 1st, 1884, except coupons funded as aforesaid.

A deed of trust, dated May 29, 1865, executed by the Quincy and Toledo Railroad Company to John T. Terry as trustee, to secure the payment of bonds amounting to $500,000, with interest at seven per cent. per annum; which deed became a lien on all that portion of railroad extending from the west bank of the Illinois river opposite Meredosia to Camp Point and Clayton, in the State of Illinois, a distance of 33.6 miles.

A deed of trust, dated the 1st day of February, A. D. 1867, executed by the Toledo, Wabash and Western Railway Company to Isaac H. Knox and James R. Jessup as trustees, to secure an intended issue of bonds amounting to $15,000,000, with interest at seven per cent. per annum thereon; that of the bonds so intended to be secured by said trust deed only $2,610,000 are now outstanding. Said deed of trust became a lien on all said railroad extending from Toledo, Ohio, to Meredosia and Naples, Illinois, and from Meredosia to Camp Point, Illinois, and also from Clayton, Illinois, to the east bank of the Mississippi river at Hamilton, Illinois; also on all property afterwards acquired by said Toledo, Wabash and Western Railway Company which might be used in connection with said railroad and all property that said company might acquire in the city of Quincy, Illinois, and also all interests of
220 said company for traffic purposes with the Chicago, Burlington and Quincy Railroad Company.

A deed of trust, dated June 3d, A. D. 1869, executed by the Decatur and East St. Louis Railroad Company to Isaac H. Knox as trustee, to secure the payment of bonds amounting to $2,700,000, with interest at seven per cent. per annum thereon. Said mortgage became a lien on all said railroad extending from Decatur, Illinois, to East St. Louis, Illinois.

A deed of trust, dated May 17, 1879, executed by the Wabash Railway Company to Solon Humphreys and Daniel A. Lindley as trustees, to secure the payment of bonds amounting to $2,000,000, with interest at the rate of seven per cent. per annum, which deed of trust became a lien, subject to other prior liens, on the following lines of railroad, with all their franchises, property, issues, rents, and profits: All the railroad of said Wabash Railway Company extending from the city of Toledo, Ohio, through the State of Indiana, and thence into the State of Illinois to Meredosia, with branch of said road to Naples and East Hannibal, and from Meredosia to Camp

Point, in the State of Illinois, and with branch of said road from Clayton to the east bank of the Mississippi river, at Hamilton, in said State, and with branch of said road leading from Decatur to East St. Louis, in the same State. Said interest was paid up to October 1st, 1884.

A deed of trust, dated May 16, 1879, executed by the Wabash Railway Company to Alfred T. White as trustee, to secure the
221 payment of bonds amounting to $500,000, with interest at seven per cent. per annum. Said deed of trust became a first lien on all of said railroad extending from Naples, Illinois, to East Hannibal, Illinois, and was given to secure the purchase-money of said property.

A deed of trust, dated March 9, 1865, executed by the North Missouri Railroad Company to Edwin D. Morgan and Louis H. Meyer as trustees, to secure the payment of bonds amounting to $6,000,000, with interest thereon at the rate of 7 per cent. per annum. Said deed of trust became a lien on all that portion of the railroad of the Wabash Company extending from St. Louis, Missouri, to Coatsville, Missouri, and from Moberly, Missouri, to North Missouri Junction, about eight miles from Kansas City, Missouri. The railroad embraced in said deed of trust is about 354.1 miles in length.

A deed of trust, dated August 12, A. D. 1874, executed by the St. Louis, Kansas City and Northern Railway Company to the Farmers' Loan and Trust Company of the City of New York as trustee, to secure the payment of bonds amounting to $3,000,000, with interest thereon at 7 per cent. per annum. Said mortgage became a lien on all the railroad of the St. Louis, Kansas City and Northern Railway Company in the State of Missouri, being 353 miles in length, as then constructed, from North Market street, in the city of St. Louis, to the southern boundary line of the State of Iowa,
222 and from Moberly, Missouri, to North Missouri Junction, in Clay county, Missouri, and as the same might be thereafter constructed through Clay county, a distance of about eight miles, to the bridge across the Missouri river at Kansas City, in Jackson county, Missouri.

Also as the same might then or thereafter be located in or through the county of St. Louis, to connect with the union depot in said city; also as the same might then or thereafter be located south of North Market street, in said city of St. Louis, together with all real estate, right of way, shops, rolling stock, depots, appurtenances, property, and franchises of said company.

Also certain blocks and lots of land, structures, and buildings described in said mortgage, a copy of which is marked Sub-Exhibit "F" No. 14 and is filed with the amended bill of the Wabash, St. Louis and Pacific Railway Company, consolidated in this cause.

A mortgage, dated October 1st, A. D. 1878, executed by the St. Louis, Kansas City and Northern Railway Company to Henry F. Vail and Charles Parsons as trustees, *the* secure the payment of bonds amounting to $1,000,000, with interest at 6 per cent. per annum, which interest has been paid to October 1st, 1885; which said mortgage became a lien on all the bridge of said last-named company

and all franchises thereof and all the real estate, approaches, and appurtenances thereof, situated in the county of St. Louis, on the south side of the Missouri river, and in the county of St. Charles, on the north side of said river, in the State of Missouri.

223 A deed of trust executed by the St. Louis, Kansas City and Northern Railway Company on the 9th day of July, A. D. 1878, to Solon Humphreys and George A. Leighton as trustees, to secure the payment of bonds amounting to $388,500, with interest at the rate of 7 per cent. per annum, which interest has been paid up to October 1st, 1885; said deed of trust became a second lien on all the bridge, franchises, and property last above described.

A deed of trust dated February 15th, A. D. 1879, executed by the St. Louis, Kansas City and Northern Railway Company to the United States Trust Company of New York as trustee, to secure the payment of bonds amounting to $2,350,000, with interest thereon at the rate of 7 per cent. per annum; that said deed of trust became a lien on a line of railroad purchased by said last-named company from the Council Bluffs and St. Louis Railroad Company, a corporation of the State of Missouri, extending from Elm Flats, in Daviess county, Missouri, in a northwesterly direction through the counties of Daviess, Gentry, Nodaway, and Atchison, in said State, to the boundary line between the States of Missouri and Iowa, a distance of 78 miles, and said deed of trust also became a lien on the leasehold interest of said St. Louis, Kansas City and Northern Railway Company in and to a certain other line of railroad extending from Council Bluffs, in the State of Iowa, in a southeasterly direction through the counties of Pottawattamie, Mills, Fremont, and Page, in said State, to the boundary line between the States of Iowa and Missouri, a distance of 65 miles, said last-mentioned railroad having been leased by

224 said St. Louis, Kansas City and Northern Railway Company from the Council Bluffs and St. Louis Railway Company, a corporation of the State of Iowa, as said railroad was then or might thereafter be constructed, together with all franchises, rights, and other appurtenances thereto belonging.

A guaranty mortgage dated February 15th, A. D. 1879, executed by the Council Bluffs and St. Louis Railway Company to the United States Trust Company of New York, intended to further secure the principal and interest of the issue of bonds last before mentioned; said mortgage became a lien on all the right, title, and interest of said Council Bluffs and St. Louis Railway Company in and to the line of railroad last aforesaid, commencing at Council Bluffs, Iowa, and extending to the boundary line between the States of Iowa and Missouri, with all the rights, franchises, and property of mortgagor company therein, as then or thereafter constructed.

A deed of trust dated July 15, 1879, executed by the St. Louis, Kansas City and Northern Railway Company to George I. Seney, of New York, to secure bonds amounting to $264,000, with interest thereon at the rate of 6 per cent. per annum; said trust deed became a lien on all that part of said railroad extending from Roseberry, Missouri, to the State line between the States of Missouri and Iowa, being 10.1 miles in length, and also upon all the right, title,

and interest of said grantor company in and to that portion of railroad between said State line and Clarinda, Iowa, a distance of
225 11.4 miles, which said grantor company acquired from the Clarinda and St. Louis Railroad Company of Iowa.

A guaranty trust deed dated July 15, 1879, executed by the Clarinda and St. Louis Railroad Company to George I. Seney as trustee, to secure the payment of bonds amounting to $264,000, with interert at 6 per cent. per annum, being the bonds last aforesaid; which deed of trust became a lien on all the right, title, and interest of said last-mentioned company in the railroad commencing at the town of Clarinda, in the State of Iowa, and extending in a southerly direction through the county of Page, in the State of Iowa, to the boundary line between the States of Iowa and Missouri.

A deed of trust dated July 1st, 1879, executed by the Champaign, Havana and Western Railroad Company to Henry W. Ford and Richard S. Brock as trustees, intended to secure the payment of bonds amounting to the sum of $1,450,000, of which $340,900 are now outstanding, with interest thereon at the rate of 7 per cent. per annum; which deed of trust became a lien on the railroad, property, and franchises of said grantor company, extending from the city of Champaign, in the county of Champaign, in the State of Illinois, running thence by way of White Heath, Clinton, Lincoln, and Mason City to Havana, near the east bank of the Illinois river, with a branch extending from White Heath to Decatur, all said points being in the State of Illinois, and said railroad and branch being of the aggregate length of 131 miles.

A deed of trust dated on the first day of December, A. D.
226 1880, executed by the Wabash, St. Louis and Pacific Railway Company to Henry F. Spaulding and John T. Terry as trustees, intended to secure the payment of bonds amounting to $1,600,000, with interest thereon at the rate of 6 per cent. per annum, of which bonds so intended to be secured only $1,200,000 were ever issued; said deed of trust became a lien on the railroad and franchises last above described, and said bonds were issued for the purpose of being exchanged for the bonds last above described.

A deed of trust dated February 6th, 1880, executed by the Centreville, Moravia and Albia Railroad Company to the Farmers' Loan and Trust Company as trustee, to secure bonds amounting to $400,000, with interest thereon at six per cent. per annum; which deed of trust became a lien on the railroad and franchises of the last-named railroad company projected to extend from a junction with the railroads of the Missouri, Iowa and Nebraska Railroad Company in the vicinity of Centreville, Appanoose county, Iowa, to a junction with the railroad of the Central Iowa Railway Company in the vicinity of Albia, Monroe county, Iowa, being about twenty-four miles in length.

A deed of trust dated March 1st, 1881, executed by the Missouri, Iowa and Nebraska Railway Company to the Mercantile Trust Company of New York as trustee, to secure the payment of bonds amounting to $2,269,000, with interest thereon at the rate of six per cent. per annum, and which deed of trust became a lien upon

the railroad, franchises, and property of said last-named company, extending from Keokuk, Lee county, Iowa, to the south line of said county and State; thence through the counties of Clark,
227 Scotland, and Schuyler, in the State of Missouri, to the north line of said State; thence through the counties of Appanoose, Wayne, and Decatur to Van Wert, Iowa, said line being about 143½ miles in length.

That said deed of trust by its terms referred to a certain prior deed of trust dated June 1st, 1870, executed by the Missouri, Iowa and Nebraska Railway Company to the Farmers' Loan and Trust Company as trustee, to secure an issue of bonds amounting to $3,025,000, with interest, and being a lien on the same property in whole or in part. The said deed of trust of March 1st, 1881, and the deed of trust of June 1st, 1870, are to be taken together as representing substantially the same debt, and are to be taken together with any judgment or decree rendered by any competent court upon any of the bonds thereby secured.

A deed of trust dated May 22, 1880, executed by the Toledo, Peoria and Western Railroad Company to Philip Henry Brown, Robert C. Martin, and John Paton as trustees, to secure the payment of an issue of bonds amounting to $4,500,000, with interest thereon at seven per cent. per annum; said deed became a lien on the railroad, franchises, and property of said last-named company, extending from a point at the eastern boundary of the State of Illinois, where it connects with the Toledo, Logansport and Burlington railway, and extending westwardly to the western boundary of the State of Illinois, in the city of Warsaw, and in the town of Hamilton, Illinois, on the Mississippi river, and also from La Harpe to Burlington, Iowa, in the State of Iowa. The said company was a
228 corporation of the State of Illinois and not of Missouri, as by mistake stated in the amended bill of the Wabash Company. This court does not by this decree determine whether said last-mentioned deed of trust did or did not become a lien on any property in the city of Burlington, Iowa.

A deed of trust dated May 22, 1880, executed by said Toledo, Peoria and Western Railroad Company to Charles E. Whitehead, J. P. Giraud Foster, and William Hill as trustees, to secure issues of income bonds aggregating to 3,900,000, with interest at the rate of 4 per cent. per annum; which deed of trust became a lien on all the railroad, franchises, and property last above described, but subject to the lien of the trust deed last above described.

A deed of trust dated July 1, 1880, executed by said Wabash Railway Company to Henry F. Spaulding and John T. Terry as trustees, to secure bonds amounting to $4,500,000, with interest at 5 per cent. per annum; that said trust deed became a lien on the railroad, franchises, and property extending from Effingham, in the county of Effingham, Illinois, by way of Strawn, in Livingston county, in said State, to Streator, in the county of La Salle, with a branch to Altamount, Illinois, being the railroad formerly known as the Chicago and Paducah railroad, and also upon the railroad formerly known as the Chicago and Strawn railway, extending from

Strawn aforesaid to or near Chicago, Illinois; said bonds so secured were issued for the purchase-money of the railroad, franchises, and property described therein.

A deed of trust dated May 31, 1881, executed by the Humes-
229 ton and Shenandoah Railroad Company to W. J. Ladd and John T. Terry as trustees, to secure bonds amounting to $2,684,000, with interest at the rate of 7 per cent.; said mortgage became a lien on the railroad, franchises, and property of said last-named company, extending from a point at Humeston, Iowa, 100 feet west of where the Chicago, Burlington and Quincy railroad crosses the Missouri, Iowa and Nebraska railroad; thence west to Shenandoah, Iowa, about 112 miles, with all its property and franchises.

A deed of trust dated February 28, 1881, executed by the Des Moines Northwestern Railway Company to the Central Trust Company of New York and James Cheney as trustees, for the purpose of further securing a portion of the bonds issued by the said Wabash Company and secured by its general mortgage aforesaid; said deed of trust became a lien on all the railroad, property, and franchises of said grantor company, extending from Des Moines, in the State of Iowa, to Fonda, in said State, a distance of 114.9 miles, said railroad being a narrow-gauge road; also that the bonds secured by said deed of trust were so issued for the uses and purposes therein defined, and all rights, as between the Des Moines Northwestern Railway Company and any party to this cause or the receivers herein, arising from said mortgage or the lease of the railroad of said company to the Wabash Company or the contract under which they were made are hereby expressly reserved from the operation of this decree and shall be hereafter enforced only in some court having jurisdiction of the property covered by said lease and mortgage.

And any claim that the receivers herein may set up against said Des Moines Northwestern Railway Company or the property
230 thereof shall be litigated in some court having jurisdiction of said railroad, and any claim of said railroad company against said receivers or the property in their possession may be litigated in the circuit court of the United States for the southern district of Iowa, eastern division.

A deed of trust dated February 17, 1881, executed by the Attica, Covington and Southern Railway Company of Indiana to the Central Trust Company of New York and James Cheny as trustees, to further secure a portion of the general mortgage bonds of the Wabash Company secured by the general mortgage aforesaid; that said deed of trust became a lien on the railroad, property, and franchises of said Attica, Covington and Southern Railway Company of Indiana, extending from Attica, Fountain county, Indiana, to Covington, in said county, a distance of 14.5 miles, and the bonds thereby secured were equal to ten thousand dollars for each mile of said road.

A deed of trust dated October 1, 1881, executed by the Wabash, St. Louis and Pacific Railway Company to the Mercantile Trust Company of New York as trustee, to secure bonds amounting to

$3,857,000, with interest at the rate of five per cent. per annum; said deed of trust became a lien on the Cairo division of the Wabash, St. Louis and Pacific Railway Company, extending from Danville, Illinois, to St. Francisville, in said State, and from Vincennes, Indiana, by way of St. Francisville to Cairo, Illinois, with all the property thereof; said bonds were issued in payment of the purchase-money of said railroad and property.

A deed of trust dated April 1, 1879, executed by the St. Louis Bridge Company to J. C. Rogers and C. E. Tracy as trustees, to secure an issue of bonds amounting to $5,000,000, with interest thereon at the rate of seven per cent. per annum; which
231 deed of trust became a lien on the property of said St. Louis Bridge Company, as therein described.

A deed of trust dated November 3d, 1881, executed by the said Wabash Company to the Mercantile Trust Company of New York and James Cheney as trustees, to secure bonds, amounting to about $2,052,000, with interest thereon at six per cent. per annum; that said deed of trust became a lien on that portion of the railroad of the Wabash Company, formerly known as the Detroit, Butler and St. Louis railroad, extending from a point on the Detroit, Grand Haven & Milwaukee railroad in or at Detroit, Michigan, where the said Detroit, Butler and St. Louis railroad intersects it, and running thence in a southwesterly direction through the counties of Wayne, Washtenaw, Monroe, and Lenawee, in Michigan, and the counties of Fulton and Williams, in Ohio, and the county of De Kalb, in Indiana, to Butler, in said State, being about 114 miles in length, with all the property and franchises pertaining to said railroad, and all property then in possession or which might be thereafter acquired for the convenience of said railroad and its business; that said trust deed was also given to remove all doubts as to the validity of a prior trust deed between the same parties, and was given to secure the purchase-money of said railroad and property.

A deed of trust dated February 1st, 1881, executed by the Peoria and Pekin Union Railway Company to the Central Trust Company of New York as trustee, to secure bonds amounting to $1,500,000, with interest at the rate of six per cent. per annum; said deed of trust became a lien on the property and franchises of said Peoria and Pekin Union Railway Company; also a second mort-
232 gage, executed by said last-named company to the Central Trust Company of New York as trustee, dated February 1st, 1881, to secure an issue of income bonds amounting to $1,500,000, with interest not exceeding six per cent. per annum; that said deed of trust became a lien on all said property last aforesaid, subject to the superior lien of said prior mortgage or trust deed.

A deed of trust dated January 1st, 1867, executed by the Chicago, Cincinnati and Louisville Railroad Company to George T. M. Davis as trustee, to secure bonds amounting to $1,000,000, with interest at the rate of seven per cent. per annum; said deed of trust became a lien on all the railroad, franchises, and property of said last-named company, extending from Peru, Indiana, to La Porte, Indiana, a dis-

tance of 71.51 miles, such lien operating on said line whether then or thereafter constructed.

A deed of trust dated June 1st, 1871, executed by the Indianapolis, Peru and Chicago Railway Company to Clifford A. Hand as trustee, to secure bonds amounting to $275,000, with interest thereon at the rate of seven per cent. per annum. The said deed of trust became a lien on the railroad, property, and franchises, of said last-named company, extending from Indianapolis, in the county of Marion, Indiana, through the counties of Hamilton, Tipton, and Howard to the city of Peru, in the county of Miami, Indiana, a distance of seventy-five miles.

A certain other second deed of trust, dated June 1st, 1881, executed by said last-named railroad company to Wager Swayne
233 and Abram W. Hendricks as trustees, to secure an intended issue of bonds not to exceed $2,275,000, of which only $2,000,000 were ever issued, with interest thereon at the rate of six per cent. per annum; said deed of trust became a lien on the railroad, franchises, and property of said last-named company, being the railroad and property last described.

A deed of trust dated June 1st, 1881, executed by the Michigan City and Indianapolis Railroad Company to Abraham W. Hendricks and Wager Swayne as trustees. Said deed of trust became a lien on the railroad franchises and property of said last-named railroad company, extending from Michigan City, in the county of La Porte, Indiana, to La Porte, in the same county, a distance of 12.75 miles. The said trust deed and the two trust deeds last before described are to be taken together as explaining each other.

A deed of trust, dated November 4, 1881, executed by the St. Louis, Jerseyville and Springfield Railroad Company to the Central Trust Company of New York and James Cheney, of Indiana, as trustees, to secure a portion of the said general mortgage bonds of the Wabash Company amounting to $15,000 for each mile of railroad embraced therein. Said deed of trust became a lien on the railroad, franchises, and property of the said St. Louis, Jerseyville and Springfield Railroad Company, extending from a point on the railroad of said Wabash Company at or near New Berlin or between New Berlin and Springfield, in Sangamon county, Illinois, to its terminus at Grafton or Jersey Landing, in Jersey county, Illinois, a distance of 71.4 miles, and that said bonds were issued to secure
234 the performance of the condition on which the Wabash Company acquired said railroad and property.

A deed of trust, dated December 1st, 1881, executed by the Des Moines and St. Louis Railroad Company to the Central Trust Company of New York and James Cheney as trustees. Said deed of trust was given to further secure a portion of the aforesaid general mortgage bonds of the Wabash Company amounting to $15,000 per mile for each mile of the railroad hereinafter described. Said deed of trust became a lien on the railroad branches and property of said grantor company, extending from Albia, Iowa, to Des Moines, Iowa, a distance of 67.3 miles, and was given to secure the performance of

the condition on which said Wabash Company acquired said railroad and property.

A deed of trust, dated March 1st, 1881, executed by the Champaign and Southeastern Railway Company to the Central Trust Company of New York and James Cheney as trustees, to further secure a portion of the general mortgage bonds of the Wabash Company amounting to $15,000 for each mile of the railroad hereinafter described. Said trust deed became a lien on the railroad, franchises, and property of said grantor company, extending from Champaign, Illinois, to Sidney, Illinois, a distance of $11\frac{6}{10}$ miles, and was given to secure the conditions on which said railroad and property was acquired by said Wabash Company.

A deed of trust, executed September 1st, 1880, by the Wabash, St. Louis and Pacific Railway Company to J. P. Giraud Foster
235 and Edward K. Goodnow as trustees, to secure the payment of seventy-three promissory notes for the sum of one thousand dollars each, with interest at the rate of six per cent. per annum. Said deed of trust was given to secure the purchase-money of the property described therein and became a lien on lots 13, 13 A, 14, 15, 15 A, 16, 17, 18, 19, 20, 21, 22, 23, and 24, all in the original plot of the city of Burlington, in the county of Des Moines, Iowa, and upon all the railroad iron therein, and on all improvements and appurtenances thereof, and all rents, issues, and profits thereof. The court further adjudges that four of said notes have been paid and satisfied, and further adjudges that the said deed of trust is a lien upon the property therein described superior to and free and clear of any lien or charges for the payment or contribution to the payment of any claims or demands whatever chargeable against such property herein.

A deed of trust, dated May 1st, 1873, made by the Boone County and Booneville Railway Company to J. M. Worden and R. A. Betts as trustees, to secure bonds amounting to $100,000, with interest at 7 per cent. per annum. Said trust deed became a lien on a railroad extending from Columbia, Missouri, to Centralia, Missouri, a distance of about 21 miles.

A deed of trust, dated 1st of October, 1875, made by the St. Louis, Ottumwa and Cedar Rapids Railway Company to Solon Humphreys and George S. Coe as trustees, to secure bonds amounting to $322,500, with interest at the rate of 7 per cent. per annum. Said deed of trust became a lien on a line of railroad extending
236 from Ottumwa, Iowa, to its intersection with the St. Louis, Kansas City and Northern railway at the Missouri State line.

A deed of trust dated August 1st, 1878, executed by the Brunswick & Chillicothe Railroad Company to George M. Rice, J. Kimball, and E. P. Burnham as trustees, to secure bonds amounting to $304,500, with interest at the rate of 6 per cent. per annum. Said deed of trust became a lien on the railroad of said grantor company from its intersection with the St. Louis, Kansas City and Northern railway at Brunswick, Missouri, to Chillicothe, Livingston county, Missouri, a distance of about 36 miles.

A deed of trust dated September 14, 1872, executed by the St.

Louis, Council Bluffs and Omaha Railroad Company to James B. Eads and J. A. Jamison as trustees, to secure bonds to the amount of $626,000, with interest at the rate of 6 per cent. per annum. Said trust deed became a lien on the line of railroad extending from Chillicothe, Missouri, to a point at or near Pattonsburg, Daviess county, Missouri, being about 43 miles in length.

A deed of trust dated October 1st, 1879, executed by the Quincy, Missouri and Pacific Railroad Company to Solon Humphreys and Orville H. Browning to secure bonds amounting to $1,204,000, with interest at the rate of 6 per cent. per annum. Said deed of trust became a lien on the line of railroad extending from a point in Missouri opposite the city of Quincy, Illinois, to Trenton, Missouri, a distance of about 134 miles.

A deed of trust dated October 1st, 1879, executed by the
237 Quincy, Missouri and Pacific Railroad Company to Amos Green and Charles H. Bull as trustees, to secure income bonds to an amount not exceeding $2,000,000, with interest thereon at the rate of 6 per cent. per annum if earned. Said deed became a lien on the line of railroad last above described.

A lease made by Eel River Railroad Company to the Wabash Company, dated August 26, 1879, of a railroad extending from Butler, Indiana, to Logansport, Indiana, on which rent was paid to June 1st, 1884.

A lease of the Quincy, Missouri and Pacific railway by Wabash Company, August 21, 1879. Said railroad intended to extend from West Quincy, Missouri, to some point on the Missouri river, but never constructed west of Trenton, Missouri, said rent being paid to January 1st, 1884.

A lease of the St. Joseph and St. Louis railroad, dated June 1st, 1874, to St. Louis, Kansas City and Northern Railway Company, said road extending from St. Joseph, Missouri, to North Lexington, in said State, the said rent being paid to March 1st, 1884.

A lease of the Boone County and Booneville railroad to the St. Louis, Kansas City and Northern Railway Company, dated May 1st, 1873. Said railroad extends from Centralia, Missouri, to Columbia, Missouri, and said rental was paid to May 1st, 1885.

A lease of the St. Louis, Ottumwa and Cedar Rapids railway to the St. Louis, Kansas City and Northern Railway Company, dated October 1st, 1875. Said railroad extends from Coatsville, Missouri, to Ottumwa, Iowa, and said rent was paid to October 1st, 1884.

A lease of the St. Louis, Council Bluffs and Omaha railroad
238 to the St. Louis, Kansas City and Northern Railroad Company, executed June 20th, 1878. Said railroad extends from Chillicothe, Missouri, to Pattonsburg, Missouri, said rent being paid to January 1st, 1885.

A lease of the Brunswick and Chillicothe railroad to the St. Louis, Kansas City and Northern Railway Company, dated August 1st, 1878. Said railroad extends from Brunswick, Missouri, to Chillicothe, Missouri, and said rental is paid to August 1st, 1885.

A lease of the Council Bluffs and St. Louis railway (in Iowa) to St. Louis, Kansas City and Northern Railway Company, dated Feb-

ruary 10, 1879. Said railroad extends from Council Bluffs, Iowa, to the State line between Missouri and Iowa, and said rent was paid to October 1st, 1884.

A lease of the Clarinda and St. Louis railroad to the St. Louis, Kansas City and Northern Railway Company, dated July 15, 1879. Said railroad extends from Clarinda, Iowa, to the State line between Iowa and Missouri. Said rent is paid to August 1st, 1884.

Lease by the Chicago and Western Indiana Railroad Company to the Wabash Company, dated October 25th, 1879, and a supplemental lease or contract dated November 1st, 1882, by the Chicago and Western Indiana Railroad Company to the Wabash Company, in which Anthony J. Thomas and Charles Edward Tracy are made parties of the third part as trustees.

A lease of the Centreville, Moravia & Albia railroad to the Missouri, Iowa and Nebraska Railway Company, dated February 6th, 1880. Said railroad extends from Centreville, Iowa, to Albia, Iowa, and said rental is paid up to January 1st, 1884.

239 A lease of the Missouri, Iowa and Nebraska railroad to the Wabash Company, dated September 3d, 1880. Said railroad runs from Keokuk, Iowa, to Van Wert, Iowa, and said rent is paid up to March 1st, 1854.

A lease of the Toledo, Peoria and Western railroad to the Wabash Company, dated May 22d, 1880. Said railroad has been hereinbefore described. The said rent was paid to April 1st, 1884.

A lease of the Humeston and Shenandoah railroad to the Wabash Company and Chicago, Burlington and Quincy Railroad Company, dated April 1st, 1881. Said railroad has been hereinbefore described.

A lease of the Des Moines Northwestern railroad to the Wabash Company, dated February 28th, 1881. Said railroad has been hereinbefore described, and said rent has been paid to December 1st, 1883.

A lease of the Attica, Covington and Southern railroad to the Wabash Company, dated July 18th, 1881. Said railroad has been hereinbefore described, and said rent was paid up to December 1st, 1883.

A lease of the St. Louis bridge and tunnel to the Wabash Company and Missouri Pacific Railway Company, dated July 1st, 1881; also includes other stipulations and provisions.

A lease of the Peoria and Pekin Union railroad to the Wabash Company and other companies, dated February 1st, 1881. This includes other stipulations and provisions. The property embraced in said instrument has been hereinbefore described.

240 A lease of the Indianapolis, Peru and Chicago railway to the Wabash Company, dated June 1st, 1881. Said railroad has been hereinbefore described, and said rental has been paid up to December 1st, 1883.

A lease of the Indianapolis and Michigan City railroad to the Wabash Company, dated June 1st, 1881. Said railroad has been hereinbefore described, and said rental has been paid up to December 1st, 1883.

A lease of the St. Louis, Jerseyville and Springfield railroad to the Wabash Company, dated November 22, 1880. Said railroad has been hereinbefore described, and said rental was paid up to December 1st, 1883.

A lease of the Des Moines and St. Louis railroad to the Wabash Company, dated March 1st, 1882. Said railroad has been hereinbefore described, and said rental has been paid up to December 1st, 1883.

A lease of the Champaign and Southeastern railway to the Wabash Company, dated March 1st, 1882. Said railroad has been hereinbefore described, and said rental has been paid up to December 1st, 1883.

A lease of the Hannibal bridge to the Wabash Company and the Missouri Pacific Railway Company, dated January 1st, 1883. Said bridge and property has been hereinbefore described.

A contract between the St. Joseph Union Depot Company, the Wabash Railway Company, and other companies for the construction and use of a depot and terminal facilities in St. Joseph, Missouri, dated September 2d, 1880.

A like contract with the Kansas City Union Depot Company, dated June 1st, 1876, the St. Louis, Kansas City and Northern Railway Company being a party thereto before said Wabash Company was created.

241 A lease and contract between Detroit Union Railway Depot and Station Company and the Wabash Company for the use of certain grounds by the last-named company, and for certain privileges and advantages in said contract specified. Said lease and contract is dated October 20, 1881, and a copy thereof is hereby referred to as Sub-Exhibit "F" 89, filed herein with the amended bill of the Wabash Company.

A contract for the construction and use of depot and grounds in Hannibal, Missouri, between the Hannibal Union Depot Company and Wabash Company, dated June 30, 1881, a copy of said contract being Sub-Exhibit "F" No. 90, filed with the amended bill of said Wabash Company in said cause.

A contract between the Hannibal and St. Joseph Railroad Company for the use by said last-named company of the bridge over the Missouri river at Kansas City, Missouri, dated June 1st, 1880, a copy of which is filed as Sub-Exhibit "F" No. 83 in the volumes of exhibits aforesaid.

It is adjudged by the court that the lien of the general mortgage on any leasehold interest or other conditional interest held or owned by the Wabash Company in or to any line or lines of railroad or any property, rights, or franchises shall not be held to impair the right of the lessor or lessees of such line or lines or the person or persons under whom the said line or lines were conditionally held by the Wabash Company to terminate any such lease or conditional interest because of any breach of the terms on which the same was granted to said Wabash Company. The declaration herein of a lien on such property in favor of said general

mortgage shall not be held to revive any leasehold or con-
242 ditional title in said Wabash Company in any instance when the same has been heretofore lawfully terminated, or to prevent the future termination thereof for the breach of any condition for which such lease or interest might be otherwise lawfully terminated or forfeited, and in all cases when any line or lines of railroad have been, by order or decree of court, surrendered to the trustee or trustees in underlying and senior mortgages, or to any receiver or person appointed by the court in whose jurisdiction the property is situated, the said leases under which such line or lines were formerly held by said Wabash Company shall be, and are hereby, adjudged and decreed to be lawfully terminated.

The court further finds that since the filing of the original bill of complaint herein by the Wabash Company the holders of all the collateral trust bonds and the holders of a very large majority of the general mortgage bonds, desiring to avoid any controversy as to the priority of said instruments as creating liens on any of the property embraced in the collateral trust, and also to avoid all delay in effecting the foreclosure of said instruments and the sale of all said property, have entered into an agreement between themselves and have invited all the other holders of general mortgage bonds to become parties thereto.

And reference is hereby made to a copy of said agreement filed with the report of Edmund T. Allen, special master, to whom this cause was referred to take proof on specified issues; the said copy is hereby referred to with the same effect as if embodied herein.

243 By the terms of said agreement both instruments are to be foreclosed by judicial decree or decrees and all property embraced therein sold under such decree or decrees. A committee was by said agreement appointed, authorized to purchase all said property or any portion thereof for the benefit of all bondholders joining in said agreement or accepting the same. The property so to be purchased shall be conveyed to a corporation to be organized for that purpose, and that the owners of both classes of bonds shall be entitled to the securities of such new company on such terms as are in said agreement prescribed.

The court therefore adjudges and decrees that if the property embraced in the general mortgage and collateral trust respectively and the rights and interests declared to be comprised therein or subject thereto by the terms of this decree shall be sold under this decree, then all the holders of general mortgage bonds or collateral trust bonds who shall have signed or accepted said agreement and all other of said bondholders who shall not within ninety days after the filing of this decree file in this court their written dissent from said agreement and their desire to litigate the question of priority of the liens of said general mortgage and collateral trust as to the property embraced in the latter instrument shall be bound by the said agreement, and as to bondholders so bound the agreement aforesaid shall be held to settle and determine all such questions of priority and superiority.

In case any of the holders of general mortgage bonds shall not sign or accept said agreement and shall within the time limited as aforesaid file in this court their dissent therefrom and
244 their desire that any question of priority as aforesaid shall be litigated in said cause, then such issue as may be necessary shall be made up as the court shall direct, but the foreclosure of said general mortgage and collateral trust and the sale of the property embraced therein shall not be delayed thereby, but such litigation shall be determined with reference to the proceeds of the sale of the property embraced in said collateral trust, a sufficient portion of which shall be retained under the control of the court to protect the rights of such possible litigants.

The court further finds that there is now pending in the supreme court of the State of Ohio a certain cause in which James Compton and certain other persons named in the record thereof seek to establish and maintain a lien adjudged in their favor by the court of common pleas of Lucas county, in the State of Ohio, upon the line of railroad of said Wabash Company, extending from Toledo, Ohio, to the eastern boundary of the State of Indiana, an appeal having been taken from the said judgment and decree of said court of Lucas county to said supreme court. It is ordered that this decree shall in no way affect the rights of said Compton and his co-complainants, as the same shall be determined by said supreme court. Any sale of the property aforesaid under this decree shall be subject to such rights and interests as said supreme court shall adjudge in said cause.

And now the court, being fully advised, does hereby order, adjudge, and decree that within sixty days from this date the Wabash Railway Company or some person or persons for it pay to the
245 Central Trust Company of New York, for the benefit of the parties entitled, the full sum of money found due as principal and interest aforesaid on said general mortgage bonds and coupons, together with interest from this date, at the rate of six per cent. per annum, and all costs of this suit, except such as the court may otherwise apportion; that in default thereof the said general mortgage be foreclosed and all the property, rights, and interests aforesaid conveyed thereby or upon which said mortgage is a lien, as hereinbefore decreed, be sold, excepting as hereinafter set forth; and it is hereby ordered, adjudged, and decreed that the following-named lines of railway heretofore, by order of this court, severed from the Wabash system and surrendered to the trustees in underlying and senior mortgages or to some receiver, person, or persons appointed by the Federal court in whose jurisdiction said lines are situated, to wit, Havana division, formerly known as the Champaign, Havana and Western railway; Indianapolis, Peru and Chicago railroad, the Chicago, Cincinnati and Louisville railroad, the Michigan City and Indianapolis railroad, together constituting the Indianapolis, Peru and Chicago division; the Quincy, Missouri and Pacific railway, the Missouri, Iowa and Nebraska railway, the Cairo and Vincennes railway, the Danville and Southwestern railroad and St. Francisville and Lawrenceville railroad, together

constituting the Cairo division, and the Toledo, Peoria and Western railroad, and also the Centreville, Moravia and Albia railroad, shall not be sold at said sale, nor shall any interest in said lines or any or either of them pass by the sale herein provided for, but the complainants herein and all persons interested in said lines are hereby
246 remitted to the said several Federal courts in whose jurisdiction said lines are situated for the adjudication and settlement of their respective claims and interests. The court further finds the Wabash Company to be wholly insolvent and the property, rights, and interests embraced in the general mortgage wholly insufficient security for the amount of indebtedness found due as aforesaid. It is ordered that the sale of said property, rights, and interests be without redemption, and said sale, when made and confirmed by the court and all the conditions thereof fully performed, shall forever bar and foreclose all right, title, and equity of redemption of said Wabash Company in said railroads, property, interests, and franchises and each part thereof, and also all the rights and interests of all persons claiming through or under said company subsequent to said general mortgage, and also all the rights and interests of all the parties hereto, except so far as the same are by this decree established or reserved.

It is also adjudged and decreed that said Wabash Company or some person for it, within sixty days from this date, pay to the Mercantile Trust Company of New York the amount of principal and interest found due as aforesaid on said collateral trust bonds, with interest thereon from this date at the rate of six per cent. per annum, and also such share of the costs of this proceeding as the court shall apportion. In default thereof all the property, securities, rights, and interests covered by and described in the collateral trust shall be sold, and all the right, title, and interest of the Wabash Company therein and of all persons claiming through or under
247 said company be forever barred and foreclosed, and also all the rights and interests therein of all parties to said cause, except so far as the same are hereby established or reserved. The court finds and adjudges that all the property embraced in said collateral trust is wholly insufficient to pay the indebtedness secured thereby, and orders that the said property be sold without redemption.

It is further adjudged and decreed that if the holders of a majority of the general mortgage bonds, acting through their committee appointed under their agreement aforesaid, shall be satisfied that any branch or portion of the lines of railroad or property embraced in and covered by said mortgage and in or to which the Wabash Company had only a leasehold or conditional title shall be wholly insufficient in value to discharge the liens resting thereon superior to said general mortgage, and that sale of such branches or portions of railroad or property would add nothing to the purchase price obtainable for all said property, the commissioner shall, at the request of such committee, proceed to sell such branches or portions of railroad, with all the rights and property pertaining thereto, separately from the other property covered by said mortgage.

It appearing to the court that since the commencement of this cause the receivers herein have, under orders of this court, purchased and paid for, in whole or in part, certain lands and lots adjacent to the lines of railroad constituting the Wabash system, the title
248 thereof being taken to James F. How, as trustee, said How being the agent of said receivers, it is hereby ordered and decreed that all the lands and lots aforesaid so purchased by said receivers be sold with the main lines of road covered by the general mortgage; that an account be hereafter taken of all the moneys paid by said receivers for the lands and lots so purchased by them; that after the sale of the property embraced in the general mortgage there shall be taken out of the proceeds of such sale and out of the proceeds of all property sold in connection therewith a sum sufficient to repay to said receivers the amount of money expended by them in the purchase of the lands and lots aforesaid, so far as the same have been paid for, and said receiver- shall hold the money so to be repaid to them to be expended under the orders of court for the general purposes of said receivership. Upon the sale of said property and upon full compliance with the conditions of said sale by the purchasers thereof said James F. How, trustee, shall upon order of court make proper conveyance of the said property to such purchasers.

The court further orders that the sale under this decree of any property, rights, or interest covered by said general mortgage shall not have the effect of debarring the holders of said general mortgage bonds or their trustees from foreclosing any other mortgages or deeds of trust given to secure said general mortgage bonds or portions thereof, whether such other mortgages or deeds of trust embrace some of the lines of railroad and property covered by the general mortgage or otherwise; but if the sale or sales under
249 this decree shall not produce a sufficient sum to pay and satisfy all the said general mortgage bonds the holders thereof and their trustees shall be at liberty to resort to such other mortgages and deeds of trust as fully in force and effect.

It is further ordered and adjudged that this decree or any sale made thereunder of the property embraced in the collateral trust shall not prevent the owners of the collateral trust bonds, so far as said bonds shall remain unpaid after the application of the proceeds of said sale thereto, from resorting to any other instrument, mortgage, or pledge for the protection of the title to the property so embraced in said collateral trust, but the said bondholders and the purchasers of the property, rights, and interests embraced in the collateral trust at any sale made under this decree shall be at liberty to resort to such other instrument, mortgage, or pledge for the protection of their title to the property so embraced in said collateral trust and sold under the foreclosure thereof.

The court orders and decrees that, subject to conditions aforesaid, the property covered by the general mortgage and collateral trust be sold at public auction, to the highest bidder or bidders, at the east front door of the United States court-house, in the city of St. Louis, in the State of Missouri, between the hours of 10 a. m. and 4

p. m. on such day as the commissioner hereinafter named shall appoint, with power to the commissioner making the sale, for proper cause, to postpone said sale without further notice save an announcement of such postponement by said commissioner at the time fixed for such sale.

Public notice of the time, place, and terms of said sale shall
250 be given by publication at least once a week for six successive weeks before said sale in one public newspaper in each of the following-named cities: New York city, New York; St. Louis, Missouri, and such other places as the courts having ancilliary jurisdiction of this cause or any of them may direct. Said notice shall describe the property to be sold in general terms, and shall refer to this decree for more particular description.

Said sale shall be made in manner following:

The commissioner executing this decree shall, except as hereinabove otherwise provided, first offer for sale all the right, title, and interest of the Wabash Company in and to all the lines of railroad covered by and described in the general mortgage and such other lines, interest, and property as have been adjudged in this decree to have become subject to the lien of said mortgage, with all the franchises, rights, interest, and property, real and personal, pertaining thereto, and all rights of way, equipments, structures, shops, tools, machinery, and materials properly belonging or appurtenant to said lines and each of them, excepting only such of said lines, with the property, franchises, interests, and appurtenances, as are herein adjudged to be subject to said general mortgage only to the extent of the leasehold or conditional title of the Wabash Company therein, and also excepting all property described in the collateral trust, whether covered by the general mortgage or not so covered, and which may be sold or offered for sale separately, as hereinbefore directed. In case any such line or property shall not be sold, together with the other property covered by the general mortgage, the same
251 shall be offered separately, and the commissioner shall conditionally accept the highest bids received therefor.

The commissioner shall then offer for sale the property embraced in the collateral trust in manner following: He shall offer all the bonds, stocks, and choses in action specified in said collateral trust together, and note the bids received therefor. He shall also offer the cars, rolling stock, and equipment described in said instrument for sale together, and note the bids received therefor. He shall then offer the steamers described in said instrument together, and note the bids received therefor. He shall then offer separately the real estate or terminal interests in Cook county, Illinois, described in said instrument, and note the bids received therefor.

After said properties and securities covered by the collateral trust have been so offered for sale separately the commissioner shall proceed to offer the whole thereof for sale together, and he shall conditionally accept the highest bids made for said lots or parcels of property and securities when offered separately or the highest bid for all said property when offered together, according as the one method or the other shall produce the largest sum in the aggregate.

Before any bid for any property sold under this decree shall be conditionally accepted by the commissioner he shall require the person or persons making such bid to deposit with him or subject to his order in some bank to be by the commissioner selected a sum in cash equal to ten per cent. of the whole amount of said bid when the amount of such bid shall be more than $100,000 and twenty per cent. on all bids below that sum.

As soon as any sale or sales shall have been made by the com-
252 missioner in pursuance of this decree he shall report the same to this court for confirmation, further certifying to the court compliance by the purchaser or purchasers with the conditions hereinbefore prescribed.

If any such bid shall be accepted by the court and the party making the same shall fail to comply with all the conditions of sale and all orders of the court made or to be made with respect thereto, then the sum so deposited shall be forfeited and shall be applied to the payment of the expenses of resale or the costs of this cause or the payment of the bonds aforesaid, as the court shall order.

In case any bid shall be rejected by the court the deposit made by the bidder shall be returned.

And if any bid or bids shall be accepted and confirmed by the court and all the conditions of sale shall be fully complied with, or if the persons making such bids shall perform all such conditions as the court shall accept as sufficient for the time being and when the court shall so order, the commissioner shall execute to such purchaser or purchasers deeds of conveyance and transfer of all the property and interests sold by him under this decree.

And thereupon the complainants herein, to wit, The Central Trust Company of New York and James Cheney, as trustees of said general mortgage, and also The Mercantile Trust Company, defendant herein, as trustee of the collateral trust mortgage, and the mortgagee, The Wabash, St. Louis and Pacific Railway Company, shall severally and in due form convey to said purchasers all their interest as trustees and as mortgagors in and to the property sold by said commissioners to said purchasers or any of them.

253 Whenever any bid shall be accepted and approved by the court the party making the same shall deposit in such depository as the court shall direct such additional cash payment as the court may require and make such further cash deposits as may be ordered by the court.

It is further ordered that after the purchasers aforesaid shall have made such cash payments as the court shall order the said purchasers shall have the right to discharge the remainder of their respective bids by the use of the bonds aforesaid—that is to say, by using the general mortgage bonds and the collateral trust bonds to make payment for the property so purchased. All said bonds and coupons shall be received in making the payments to which they may be applied respectively ratably and without discrimination and at such valuation as would be equivalent to the distributive share applicable thereto if the whole sum bid had been paid in cash.

It is further adjudged that in order to enable the purchasers of

said lines of railroad and property to raise the means necessary to discharge all claims, debts, and demands equitably chargeable against the same in preference to said bonds by the use of the securities of the new corporation intended to be organized to take said lines of railroad or the chief part thereof, if such purchasers shall make such cash payments as the court shall require and order and discharge the remainder of their bids respectively by the payment of cash or the use of bonds as aforesaid, such purchasers shall be entitled to the conveyance and assignment of the property
254 purchased by them and each of them as hereinbefore provided; but such conveyance or assignment shall not have the effect of discharging any part of said property from the payment or contribution to the payment of claims or demands chargeable against the same, whether for costs and expenses, the expenses of the receivership of said property, and the full payment of all the debts and liabilities of said receivers or upon intervening claims allowed or to be allowed, or upon any other claims or allowances that have been or may be charged against said property or any part thereof or said receivers, either by this court or by any other circuit court exercising ancillary jurisdiction or by any other court to which any of the parties hereto, including the receivers, have been hereby remitted in proceedings or actions ancillary hereto or otherwise.

Nor shall such conveyance, transfer, or assignment withdraw any of said railroads, property, or interests to be sold under this decree, as hereinbefore directed, from the jurisdiction of this and the other courts aforesaid, but the same shall remain in the custody of the receivers until such time as the court shall, on motion, direct said property in whole or, from time to time, in part to be released to said purchaser or purchasers or any of them, and shall afterwards be subject to be retaken and, if necessary, resold if the sums so charged or to be charged against said property or any part thereof or said receivers as aforesaid *said* shall not be paid within a reasonable time after being required by order of this or said other courts. The conveyance and transfer of said property shall be subject to the
255 power and jurisdiction of the said courts, and the purchasers of any part of said property shall thereby become and remain subject to said jurisdiction so far as necessary to the enforcement of this decree, and such jurisdiction shall continue until all the claims and demands that have been or may be allowed against said property or any part thereof or said receivers by order of said courts shall be fully paid and discharged. The provisions aforesaid shall apply to the purchasers at said sale and to all persons taking said property through or under them.

The commissioner executing the decree shall apply the proceeds derived from said sale and also all the proceeds derived from any body, natural or artificial, in satisfaction of the claims charged or to be charged against said property and all parts thereof as aforesaid in the manner following:

First. To the payment of all the costs of this cause in this court nd in all other courts wherein ancillary jurisdiction was taken, in-

cluding such allowances as this and said other courts have or shall make for solicitors' and counsel fees, and for the services of all trustees, masters, commissioners, clerks, stenographers, printers, and others rendering services in the prosecution of the several causes consolidated herein or ancillary to the original cause; also all the expenses of making said sale or sales and otherwise enforcing and carrying out this decree.

Second. To the payment of all the indebtedness of the receivers herein and all other claims which said courts or some of them may adjudge to be superior to said bonds, and to the payment of all labor and supply claims falling within the order of this court of May 29, 1884, which now are or may be unpaid.

256 Third. In payment of all expenses incurred by the committee of bondholders and the purchasing committee in bringing about the said agreement between the holders of the general mortgage bonds and the holders of the collateral trust bonds and of carrying the same into effect, and, generally, in the reorganization of the Wabash Company, including a proper remuneration for the members of said committee.

Fourth. To the payment of the two classes of bonds aforesaid *pro rata*, as far as the same can be paid in whole or in part out of the proceeds of said sale or sales, or by the application of the bonds aforesaid in lieu of purchase-money under the provisions of this decree relating thereto.

Edmund T. Allen is hereby appointed commissioner to execute this decree. He shall make and file in this court an affidavit faithfully and impartially to execute this decree, and to obey the orders of this and the other courts aforesaid in the discharge of the duty hereby imposed. All claims and demands against said property or said receivers or the proceeds of said sales not hitherto or herein adjudged and determined, whatever the character of such claims and demands, are hereby reserved for future action by this and said other courts; and all questions arising under any answers of parties hereto and on all cross-bills and other pleadings or intervening petitions not herein or heretofore determined are hereby reserved for future adjudication, the settlement of the same being held not necessary to the purposes of this decree.

It is further ordered that the Central Trust Company of New
257 York and James Cheney and the Mercantile Trust Company of New York or some of them present this decree to the other courts entertaining ancillary jurisdiction of the said consolidated cause, and pray that the same be approved by said courts and entered as the decree thereof.

All bids conditionally accepted by said commissioner for any railroad property or interest ordered to be sold by this decree shall be reported to said courts as their several jurisdictions may require, and be subject to confirmation or rejection by said courts.

The court also adjudges that the indemnity mortgage referred to in the bills of complaint herein made by the Wabash Company to the St. Louis, Iron Mountain and Southern Railway Company is

subject and inferior to the lien of the general mortgage and collateral trust.

The statements in this decree of the amount of bonds outstanding or of interest or rental paid or unpaid on any of the mortgages, deeds of trust, leases, or contracts herein declared to be superior to the lien of the general mortgage or collateral trust shall not be taken as adjudicating or determining the matters so stated. Such amounts are so stated in this decree only for the purpose of enabling persons who may desire to purchase said property to determine approximately the amount of prior liens or other charges upon said property and each part thereof.

It is ordered that said commissioner make full report of his doings to this court.

(Signed) DAVID J. BREWER,
Circuit Judge.
SAMUEL TREAT,
District Judge.

258 On the 26th day of April, 1886, the railroads and property directed by said decree and supplemental decree to be sold were offered for sale by said commissioner, and said Joy, Ashley, Hubbard, and Welles, trustees, became the purchasers of said railroads and property for the price and sum of $625,000, subject to the terms and condition of said decree of foreclosure and sale.

Report of sale was filed by said commissioner on the 28th day of April, 1886, and an order of confirmation made by the court on the 15th day of June, 1886. By said order of confirmation said commissioner was ordered to execute to the purchasers at said sale (including said Joy *et al.*, trustees) proper deed or deeds of conveyance, in accordance with said decree of sale, of all and singular — premises, property, and franchises purchased, upon compliance by them with the conditions contained in said order of confirmation and subject to the terms and conditions of said decree of sale.

Said commissioner, on the 20th day of September, 1886, filed in said consolidated cause his report, setting forth that said Joy *et al.*, trustees, had fully complied with the terms of said order of confirmation and had paid over to said commissioner the sum of $625,000 by them bid for the property by them purchased as aforesaid. With said report said commissioner filed forms of deeds to be by him executed to the purchasers at said sale.

On the 21st day of September, 1886, said last-mentioned report came on to be heard before the court and was confirmed, and said commissioner was ordered and directed to execute and deliver to said "purchasing committee" proper deeds to the property by said committee purchased as aforesaid. The forms of deeds filed by said commissioner were approved.

259 The Central Trust Company of New York and James Cheney, as trustees of said "general mortgage;" the Mercantile Trust Company, as trustee of the "collateral trust mortgage;" said Wabash, St. Louis and Pacific Railway Company and Solon Humphreys and James F. How, trustees (of certain real estate), were

also by said last-mentioned ordered directed to severally and in due form convey to said purchasers all their interest as trustees and as mortgagors in and to the property sold by said commissioner to said purchasers.

The deeds and conveyances aforesaid ordered to be made, executed, and delivered by said commissioner, Central Trust Company, Mercantile Trust Company, Wabash Railway Company, Humphreys and How to said purchasers (including said "purchasing committee") have been made and executed and delivered as ordered and directed.

Possession of the property was not delivered to the purchasers when said deeds were executed and delivered.

On the 31st day of December, 1886, the following order was made in said cause by said court:

260 At a stated term of the circuit court of the United States for the eastern district of Missouri, held at the court-house, in the city of St. Louis, on the 31st day of December, 1886.

Present: The Honorable David J. Brewer and the Honorable Samuel Treat, judges.

THE CENTRAL TRUST COMPANY OF NEW YORK and JAMES CHENEY, Complainants, *vs.* THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*, Defendants.	In Equity. Nos. 2357 and 2464. Consolidated Cause.

Order of Court Concerning Possession of Property under Decree of January 6th, 1886. December 31st, 1886.

And now come James F. Joy, Ossian D. Ashley, Thomas H. Hubbard, and Edgar P. Wells and submit their petition, praying that the court will direct that all the property purchased by them as a committee representing certain bondholders be turned over and be delivered to them, and submit also an order proposed in connection with said petition; and the court, having considered the same, does refuse to make the order so submitted, and thereupon the

261 court, of its own motion, does order, adjudge, and decree that the said purchasers, as a committee as aforesaid, shall within sixty days from the entry of this order pay into the registry of this court the sum of one million dollars in cash or in certificates now outstanding of Solon Humphreys and Thomas E. Tutt, receivers, and shall also within the same period, as such committee, give bond or security to be approved by this court in the sum of one million dollars, conditioned to pay the full amount of the said receivers' indebtedness and other demands stated in the final decree herein, and to comply with all the further orders of this court; that such payment shall be made and security given by said purchasers in their capacity as a committee and as agents and not as individuals, and shall be made and given by the use of the moneys or means in their possession or control as such committee.

And the court doth further order and decree upon making the payment and giving the security hereinbefore ordered the said pur-

chasers, as such committee, shall take and the said receivers shall deliver to them possession of the entire property purchased by them under the decree of foreclosure entered in this cause January 6th, 1886, and that such possession shall be subject to the right of this court to retake possession of said property or any part thereof on failure of said purchasers or their successors to comply with any further order of this court, and shall also be subject to all the terms and provisions of the said decree and of the order of this court heretofore made confirming the sale of said property under said decree.

DAVID J. BREWER,
Circuit Judge.
SAMUEL TREAT,
U. S. District Judge.

On the 30th day of March, 1887, the following order was made in said cause by said court.

262 In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*, Defendants.	Nos. 2357 and 2464. Consolidated Cause. In Equity.

Order on Receivers to Turn Property Over to Purchasing Committee, March 30th, 1887.

Recital: One million dollars already paid under order of December 31, 1886.

Now, on the 30th day of March, 1887, this cause coming on for further hearing, and the receivers herein appearing by their counsel and the purchasing committee, hereinafter mentioned, appearing by their counsel and applying to the court for possession of the property heretofore purchased by them, and it appearing to
263 the court, from a report of the special master filed herein on the 5th day of March, 1887, that said purchasing committee, composed of the parties mentioned in the order entered in this cause by the court of its own motion on the 31st day of December, 1886, did, within sixty days from the date of said order, and in pursuance thereof, pay into the registry of this court the sum of one million dollars in cash and the certificates of Solon Humphreys and Thomas E. Tutt, receivers; and the court having, on the 28th day of February, 1887, by an order duly entered herein, among other things directed that the giving of a bond or security by said committee, as required by said order of December 31st, 1886, be postponed

without prejudice to the rights of said purchasers; and it further appearing to the court that said purchasing committee did, on the 27th of March, 1887, deposit to the credit of said receivers, Humphreys and Tutt, in the National Bank of Commerce in the city of New York, a further sum of two hundred and fifty thousand dollars in cash, to be used by said receivers in paying their certificates due prior to April 1st, 1887, at par, and accrued interest: Now, in consideration of the premises, it is ordered, adjudged, and decreed by the court—

A further sum of $250,000 paid March 27, 1887.

First. That said purchasing committee, as such, file their bond, herein conditioned that they will, from moneys now in their hands as such committee (and not from the earnings of the railroads purchased by them), pay into the registry of this court or place to the credit of said receivers in some bank to be designated by said receivers the further sum of seven hundred and fifty thousand dollars ($750,000), to be used as the same may, from time to time, be required by said receivers to pay their own obligations or such obligations of said Wabash, St. Louis and Pacific Railway Company as said receivers have been heretofore ordered or may be hereafter ordered to pay by the court.

Bond to be given in sum of $750,000.

Second. And in order to carry into effect the provisions of the foreclosure decree entered
264 herein on or about January 6th, 1886, and of the order or decree entered herein on or about June 15th, 1886, confirming the report of sale of certain property therein described to said purchasing committee, in which decrees it was, among other things, provided that said purchasing committee should, as a condition of their said purchase, pay such sums of money as might be needed and as this court or the other courts exercising ancillary jurisdiction in this cause might direct them to pay in order to meet claims which this court or said other courts might adjudge to be prior in equity to the mortgage foreclosed—

It is further ordered, adjudged, and decreed that said purchasing committee or their successors or assigns from time to time pay into the registry of this court or deposit in some bank in the city of St. Louis to the credit of said receivers such other and further sums of money, in addition to said seven hundred and fifty thousand dollars, as may be required, and, as the same may be required, to pay all debts and liabilities of every kind contracted or incurred by said receiv-

Further sums to be deposited as required to pay receivers' indebtedness.

ers in preserving, maintaining, improving, or operating the railroads and properties in their charge or incurred by said Wabash, St. Louis and Pacific Railway Company in maintaining and operating said railroads, and which debts and liabilities said receivers have been heretofore ordered or may be hereafter ordered to pay by this court or any of the other courts exercising ancillary jurisdiction in this cause.

Committee to take possession April 1, 1887, of all lines purchased.

Third. It is further ordered, adjudged, and decreed that on the first day of April, 1887, said purchasing committee take possession of all the railroads and other property purchased by them under said foreclosure decree, wheresoever situated; and said receivers are hereby ordered and directed to deliver to said purchasing committee or its assigns on the day last aforesaid all the railroads and other property of said Wabash, St. Louis and Pacific Railway Company, wheresoever situated, purchased by said committee, whereof
265 they took possession as receivers and which now remains in their possession or under their control.

Receivers to deliver to committee all lines in their possession purchased under decree.

Fourth. And it further appearing to the court from the record of proceedings in this cause that the "general mortgage" of the Wabash, St. Louis and Pacific Railway Company or other mortgages given by corporations, parties to this suit, to the Central Trust Company of New York and James Cheney, trustees, to secure said general mortgage bonds are the only mortgage liens on certain railroads and their appurtenances hereinafter described and which are now in the possession of said receivers or under the control of this court or the other courts exercising ancillary jurisdiction in this cause; and it further appearing from the record and proceedings in this cause that the title and interests of said Wabash, St. Louis and Pacific Railway Company in said railroad were offered for sale under the foreclosure decree herein, but that the same were not sold for want of bidders, to wit, the St. Louis, Jerseyville & Springfield railroad, extending from Bates to Grafton, in the State of Illinois; the Champaign & Southeastern railroad, extending from Champaign to Sidney, in the State of Illinois; the Attica, Covington & Southern railroad, extending from Attica to Covington, in the State of Indiana; the Des Moines & St. Louis railroad, extending from Albia to Des Moines, in the State of Iowa; and it further appearing to the court from the record

Mortgages given to secure general mortgage bonds first liens on certain lines.

Lines last mentioned not sold for want of bidders.

and proceedings in said cause that there is also in the possession of said receivers a line of railroad known as the Des Moines Northwestern railroad, extending from Des Moines, Iowa, to Fonda, in said State, and that the only mortgage lien thereon is a mortgage executed on or about the 28th day of February, 1881, by the Des Moines Northwestern Railway Company to the Central Trust Company of New York and James Cheney, trustees, to secure such of said general mortgage bonds of the Wabash, St. Louis and Pacific Railway Company as might be actually issued for the

266 construction of such railroad, but that no title or interest of said Wabash, St. Louis and Pacific Railway Company in or to said railroad was sold or offered for sale under said foreclosure decree; and it further appearing to the court from the agreement under which said purchasing committee was formed, as said agreement is set forth in the report of Special Master Edmund T. Allen, filed herein on or about the 29th day of December, 1885, being the same agreement referred to in said foreclosure decree, that said purchasing committee are the representatives and agents of all the owners and holders of said general mortgage bonds—

Mortgage given to secure general mortgage bonds a first lien on Des Moines Northwestern.

Des Moines Northwestern not offered for sale under decree.

Purchasing com. are agents and representatives of the owners and holders of all the general mortgage bonds.

It is therefore further ordered, adjudged, and decreed that said committee on the day aforesaid take possession of all the aforesaid lines of railroad on which mortgages given to secure said general mortgage bonds are a first lien, to wit, the St. Louis, Jerseyville and Springfield railroad, the Champaign and Southeastern railroad, the Attica, Covington and Southern railroad, the Des Moines and St. Louis railroad, and the Des Moines Northwestern railroad, and said receivers are hereby ordered and directed to deliver to said purchasing committee on said day all the railroads last aforesaid and their appurtenances, but the delivery of said railroads and their appurtenances to said purchasing committee is made subject to the right, hereby reserved to this court and to the other courts exercising ancillary jurisdiction in this cause, to retake and, if necessary, to resell them, as is provided in said foreclosure decree with respect to retaking and reselling the railroads and property purchased thereunder in case said committee or their assigns shall fail or refuse to pay the debts and liabilities of said receivers or of said Wabash, St. Louis and Pacific Railway Company which said courts or either of them have

Committee to take possession of all lines not purchased on which mortgages given to secure general mortgage bonds are first lien.

Lines last mentioned may be retaken and resold if receivers' debts are not paid.

adjudged or may adjudge to be liens or charges upon said properties or any of them superior to the mortgages given to secure said general mortgage bonds.

Eel River railroad not sold.

267 Fifth. And it further appearing to the court from the record and proceedings in this cause that said receivers are now in possession of the Eel River railroad, extending from Logansport to Butler, in the State of Indiana, and that said railroad was held by said Wabash, St. Louis & Pacific Railway Company under a lease executed by the Eel River Railroad Company to the Wabash Railway Company on or about the 26th day of August, 1879; and it further appearing to the court that the leasehold interest of the Wabash, St. Louis and Pacific Railway Company in said Eel River railroad was offered for sale under the foreclosure decree aforesaid, and that the same was not sold for want of bidders—

Eel River railroad to be tendered to purchasing com.

It is therefore further ordered, adjudged, and decreed that the possession of said Eel River railroad and its appurtenances be tendered to said purchasing committee on said first day of April, 1887, and that in case said committee declines to accept possession thereof, then that said receivers forthwith surrender the same to said Eel River Railroad Company.

Receivers to retain books and papers.

Sixth. For the purpose of enabling said receivers to make final settlement of their accounts and doings in the management of said property, it is further ordered, adjudged, and decreed that, until otherwise directed, they retain in their custody all books of account, papers, and documents now in their possession which relate to the operation or management of the property in their charge or the earnings or expenses thereof, or that pertain to the funds collected and disbursed by them or which relate to the business of said Wabash, St. Louis and Pacific Railway Company prior to said receivership, and which books, accounts, papers, and documents it may be necessary or convenient for them to have in order to adjust and settle their own accounts or accounts and claims against said company or its property which said receivers have been ordered or may be hereafter ordered

Receivers to continue to adjust and pay their accounts.

268 to pay by this court or any other court exercising ancillary jurisdiction in this cause, and said receivers will until their final settlement and discharge continue as heretofore to adjust their said accounts and the aforesaid accounts of said company, and they will from funds which

may come into their possession under the provisions of this or any other order or decree pay said accounts and claims as they severally become due and payable.

All moneys in hands of receivers and all earnings of property prior to April 1, 1887, to be used in paying indebtedness.

It is further ordered, adjudged, and decreed that all the revenues of said property earned prior to said first day of April, 1887, be as far as practicable collected by said purchasers or their assigns and paid over to said receivers, and that all such funds, as well as all funds in the hands of said receivers or subject to their control on said first day of April, 1887, be used by said receivers in paying said indebtedness; and

Funds and certificates in registry of court to be delivered to receivers.

It is further ordered, adjudged, and decreed that all funds and receivers' certificates now in the registry of this court be forthwith delivered to said receivers, and that said funds be also used by them for the purposes last aforesaid.

Unjust claims may be litigated by purchasers.

Seventh. It is further ordered, adjudged, and decreed that if any claim shall be made or presented against said receivers which they may deem unauthorized, illegal, or unjust they shall forthwith notify said purchasing committee or its assigns thereof, and thereupon said committee or its assigns may, without any further order or authority from this court, litigate and defend against such claims, but all the expenses of said litigation shall be paid by said committee or its assigns, and in case any claims shall be presented against said receivers with respect to the legality or justice of which they are in doubt they may pay the same with the approval of said committee or its assigns.

Doubtful claims may be paid by receivers with approval of purchasers.

Court reserves the right to make all further orders necessary to enforce decree.

Eighth. This court reserves unto itself the right to make all such other and further orders concerning the custody of the property taken
269 possession of by said purchasing committee under this order and with respect to the payment of such other and further sums of money by said committee or its assigns as may be deemed necessary to carry into effect the provisions of said foreclosure decree, and said receivers may from time to time apply to this court for such other and further orders and instructions as they may deem necessary.

Receivers may apply for further orders.

Nothing in this order contained or in bond of committee to be construed as affecting former decrees and orders.

Ninth. Nothing in this order contained is intended to modify or shall be construed as modifying or revoking anything contained in the decree of foreclosure entered herein on or about January 6th, 1886, or as modifying or revoking anything contained in the order entered herein

on or about the 15th day of June, 1886, confirming the sale to said purchasing committee of portions of the property described in said foreclosure decree, but the provisions of this order and of the bond herein mentioned and required of said purchasing committee are intended to be in addition to the several matters and things contained in the decrees and orders aforesaid.

Mercantile Trust Company to deliver to committee property in its possession.

Tenth. On presentation of a copy of this order to the Mercantile Trust Company of New York, with an endorsement thereon under the hand of the clerk and the seal of this court to the effect that the bond of said purchasing committee, as herein required, has been filed and approved, said Mercantile Trust Company of New York shall deliver to said purchasing committee all the property purchased by them under said foreclosure decree now in possession of said trust company.

Receivers to give notice that claims not presented within four months will be barred.

Eleventh. For the purpose of enabling said receivers to make final settlement of their accounts at an early day it is further ordered, adjudged, and decreed that they cause to be printed for thirty days in at least one newspaper published in some town or city on the line of the railroad in each of the States in which the railroads
270 taken possession of by them as receivers are situated a notice addressed to all persons having claims against them as receivers or against said Wabash, St. Louis and Pacific Railway Company of a class which they as receivers have been ordered to pay, setting forth that all such claims not presented to and approved by said receivers or presented to this court for adjudication or allowance within four months after the first publication of said notices will be forever barred as claims against them and the funds of said receivership, and that such parties will thenceforth stand remitted to such rights as they may have against the property described in said foreclosure decree.

(Signed) DAVID J. BREWER,
Circuit Judge.

271 In pursuance of the order of March 30th, 1887, above mentioned, the purchasers entered into possession of said property and filed their bond in the sum of seven hundred and fifty thousand dollars, and have since paid the full amount of said bond according to its terms.

Said purchasing committee at the date of the appeal herein hold title as aforesaid to said property.

Appeal Bond.

Know all men by these presents that we, The Quincy, Missouri and Pacific Railroad Company and Theodore Gillman and Charles H. Bull, as principals, and John H. Overall & F. N. Judson, as sureties, are held and firmly bound unto Solon Humphreys and Thomas E. Tutt, receivers of the Wabash, St. Louis and Pacific Railway Company, in the full and just sum of two hundred and fifty dollars, to be paid to the said Solon Humphreys and Thomas E. Tutt, receivers as aforesaid, heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, successors, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at the March term, A. D. 1888, of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, in a suit depending in said court between said Theodore Gillman and Charles H. Bull, as trustees, and said Quincy, Missouri and Pacific Railroad Company, as intervening petitioners in consolidated cause- Nos. 2357 and 2464, in equity, wherein The Central Trust Company of New York and James Cheney, as trustee, are plaintiffs and The Wabash, St. Louis and Pacific Railway Company *et al.* are defendants, there was rendered against the said principal obligors herein a final decree in favor of the said obligees herein, and the said principal obligors herein having obtained an appeal of the said court to reverse the said final decree in the aforesaid suit, which said appeal was prayed in open court on the 22d day of March, 1888, to the Supreme Court of the United States at a term thereof to be holden at Washington city the second Monday of October next:

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Now, the condition of the above obligation is such that if the said principal obligors shall prosecute said appeal to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

[SEAL.] QUINCY, MISSOURI & PACIFIC R. R. CO.,
By CHARLES H. BULL, *President.* [SEAL.]
CHARLES H. BULL. [SEAL.]
THEODORE GILLMAN,
By HOUGH, OVERALL & JUDSON, [SEAL.]
His Att'y-.
JOHN H. OVERALL. [SEAL.]
F. N. JUDSON. [SEAL.]

Approved by—
AMOS M. THAYER, *Dist. Judge.*

273 UNITED STATES OF AMERICA, *Eastern Division of the Eastern Judicial District of Missouri,* } *ss:*

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record and proceedings *in re* intervening petitions of Theodore Gillman and Charles H. Bull, trustees, and The Quincy, Missouri & Pacific Railroad Company (consolidated) in case- No. 2357 & 2464 of The Central Trust Company of New York *et al.*, complainants, against The Wabash, St. Louis & Pacific Railway Company *et al.*, defendants, as fully as the same remain- on file and of record in said case- in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in the eastern division of said district, this 15th day of September, in the year of our Lord eighteen hundred and eighty-eight.

(Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.)

A. P. SELBY,
Clerk of said Court.

[Endorsed:] No. 2357 & 2464. United States circuit court, eastern division of the eastern judicial district of Missouri. Central Trust Co. of New York *et al.* against Wabash St. Louis & Pacific Railway Company *et al.* Duly certified transcript *in re* Gillman and Bull, trustees, and the Quincy, Missouri and Pacific Railroad Co., intervenors in the above-entitled cause.

Endorsed on cover: Case No. 13,284. E. Missouri C. C. U. S. No. 223. The Quincy, Missouri & Pacific Railroad Company and Theodore Gilman and Charles H. Bull, trustees, appellants, *vs.* Solon Humphreys and Thomas E. Tutt, receivers of the Wabash, St. Louis & Pacific Railway Company. Filed October 13, 1888.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

QUINCY, MISSOURI & PACIFIC RAILROAD COMPANY ET ALS., APPELLANTS,
vs.
SOLON HUMPHREYS AND THOMAS E. TUTT, RECEIVERS, ETC. } No. 223.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

STATEMENT.

A few facts shown by the record are omitted from the statement of Gov. Chamberlain, which possess, perhaps, sufficient importance to warrant me in directing the attention of the court to them. In preparing this statement and brief I have referred to the pages of the printed record in the case of St. Joseph & St. Louis R. R. Co. *v.* The Same Re-

ceivers (No. 287, October Term, 1891), which is substantially the same as the record in this case.

I. *The Wabash Company asks the appointment of receivers.*

On May 27th, 1884, the Wabash Company filed a bill in equity in the Circuit Court for the Eastern District of Missouri (Record, p. 244), declaring itself to be insolvent, and alleging that its property was subject to certain mortgages. Two of these mortgages covered the entire Wabash system. The first of these in point of time was called the General Mortgage, and the trustees therein were the Central Trust Company of New York and James Cheney. For the sake of brevity, we shall hereafter use the term "The Central Trust Company," as representing both of these trustees. The other was an indemnity mortgage to the St. Louis, Iron Mountain and Southern Railway Company (which we shall hereafter call the "Iron Mountain Company"), and was given for the purpose of indemnifying that company for certain advances made, or to be made by it, to the Wabash Company. (Record, pp. 225, 227). This indemnity mortgage was subsequent in point of time and subject to the general mortgage.

In its bill of complaint the Wabash Company declared itself to be a corporation organized under the laws of the State of Missouri and a citizen of Missouri. (Record, p. 224.) It named as defendants the trustees in the general mortgage, the Iron Mountain Company, and a large number of other railroad corporations and individuals, including appellant, which was, and always has been, a corporation of Missouri.

The prayer of the bill was that one or more receivers be appointed to take possession of the entire property, and to

preserve, operate, manage and control the same, and that a sale of the property be decreed. (Record, p. 232.)

No service was had upon appellant until long after the appointment of the receivers, and appellant had no notice whatever of the filling of the bill nor of the intention of the Wabash Company to apply for receivers nor of their actual appointment, nor of their taking possession of appellant's road, until after all these were accomplished facts. It appears, however, from the allegations of the bill, that notice and a copy of the bill were served on the trustees in the general mortgage before the bill was filed. (Record, p. 236.) These allegations are not denied. Furthermore, in their cross-bill the trustees allege that they had intended and proposed to file a bill for the foreclosure of the mortgage, and for the appointment of receivers, and would have done so had they not been anticipated by the Wabash Company. (Record, p. 241.)

II. *Receivers are appointed and take possession of appellant's road and property.*

On the same day on which the bill was filed, the Circuit Court made an order appointing Solon Humpreys and Thomas E. Tutt receivers of all the property of the Wabash Company, "with power and instructions to take possession of the same and to manage, control and operate said railroad" (Record, p. 239); and all parties were required to surrender to these receivers all the lines of said railroad. (Record, p. 240.) It was further ordered that the receivers, "out of the income that should come into their hands from the operation of said railroad, *or otherwise*" should "pay all rentals accrued, or which may hereafter accrue, upon all leased lines of said complainant." (Record, pp. 239, 246.)

On May 29th, 1884, the receivers took possession of the

property, including the road of appellant. On May 31st, 1884, the Iron Mountain Company appeared, and entered its formal consent to the order whereby Messrs. Humphreys and Tutt were appointed receivers. (Supplemental Record.)

On June 9, 1884, being only eleven days after the appointment of the receivers, the trustees in the general mortgage appeared, and filed their cross-bill, in which they prayed for the foreclosure of their mortgage and for the sale of the property, mentioning specifically appellant's road and others. This cross-bill contained a prayer for the appointment of receivers, "with the usual powers of receivers in like cases, of all and singular the mortgaged property and premises, and that such receivers be authorized and directed to maintain and operate said railroads, and to keep the same in proper repair." (Record, pp. 241-242.)

That part of the prayer asking the appointment of receivers under the cross-bill was refused by the court, on the ground that it had been already substantially granted; that all the trustees desired was that some one should preserve the property for the benefit of the mortgagees, which involved no question except a technical or formal one, and the court might appoint for that purpose the same men who already occupied the position. (Record, pp. 242, 243, 272.)

The trustees afterward filed an amended cross-bill in the Federal Court, and, at a still later date an original bill in one of the State Courts of Missouri, which latter cause was immediately thereafter removed by the complainants to the Federal Court for the Eastern District of Missouri, where it was consolidated with the suit originally brought by the Wabash Company. This original bill filed in the State Court was substantially like the cross-bills previously filed, and like them contained a prayer for the foreclosure of the mortgage, and the appointment of receivers.

The receivers retained possession of, and continued to operate appellant's road until they surrendered it to appellant by order of the Circuit Court, appellant having applied for a cancellation of the lease upon the ground of non-compliance with the covenants thereof. (Record in the Q. M. & P. case, pp. 185, 190.) At a previous date, however, the receivers had sought to cancel the lease. (Record, pp. 261–267.) The court declined to take such action, though it did direct the receivers to reduce the extent of its operation. (Record, p. 271.)

III. *The receivers took possession of and operated appellant's road without objection, and held themselves out as having assumed the lease; and this was done with the full knowledge and consent of the lessee and the mortgagees.*

With full knowledge of the condition and state of repair of appellant's road, and of its earning capacity, the receivers took possession of it and operated it without a word of objection, without any intimation to the court, the trustees, mortgagees or appellant itself that they considered the road unprofitable, or that its operation was disadvantageous to the system, or to the creditors, secured or unsecured.

The lessee and both mortgagees not only permitted the receivers to operate appellant's road without dissent, but the record shows an express assent on the part of each of them. The lessee incorporated in the prayer of its bill a request that the rentals be paid. (Record p. 233.) The order of the Circuit Court appointing the receivers, expressly directed them to pay the rentals accrued and to accrue. (Record, pp. 239-40.) The Iron Mountain Company within two days thereafter appeared in court and consented to the order. (Supplemental Record.)

The trustees in the general mortgage made their assent equally explicit. A copy of the bill, with notice of the application about to be made for the appointment of receivers, was served on them before the bill was filed. (Record, p. 236.) To this they made no opposition. Subsequently on four several occasions they manifested an express assent to the appointment of receivers, viz: in their cross-bill, filed June 9th, 1884 (Record p. 242); in their amended cross-bill, filed October 14th (Record, p. 260); in their original bill, filed in the State court January 13th, 1885, and immediately removed to the Federal court and consolidated with the suit which had been brought in the name of the Wabash Company (Record p. 260); and, finally, in their answer to appellant's intervening petition. (Record, p. 31.)

In the two cross-bills, and in the original bill filed by the trustees, they pray that the entire property of the Wabash Company be placed in charge of the receivers, and that the receivers be directed to operate all the railroads of the system. If these trustees were dissatisfied with the assumption of appellant's lease by the receivers, here were three several opportunities for them to make known their dissatisfaction. But the record will be searched in vain from end to end for one word of objection on their part to the order of the court or the action of the receivers thereon. They never suggested that the order should even be modified. On no occasion did they intimate that the payment of rent to the leased lines would be unjust to the interests represented by them.

On the other hand, appellant had no right to object to the appointment of the receivers, nor did it have any opportunity to do so, inasmuch as the order was made and its road was in the hands of the receivers before it had any information of the intended move.

IV. *The decree of foreclosure.*

On January 6th, 1886, a decree of foreclosure was entered in the consolidated cause, which decree will be found on pages 279 and following of the record. The court below expressly founds this decree, not on the bill filed by the Wabash Company, but upon the bills and the cross-bills of the trustees in the mortgages. The decree throughout treats the proceeding as one brought by a mortgagee to foreclose a mortgage, and is in form and substance a decree rendered upon the bill of the mortgagee and the answer of the mortgagor. (Record, p. 282.) The order confirming the sale recites that the Central Trust Company and James Cheney, who were the trustees in the general mortgage, are the complainants. (Record, p. 315.) In fact, the style of the case after the consolidation was "The Central Trust Company, of New York, et al., Complainants, *v.* The Wabash, St. Louis and Pacifiic Railroad Company, Defendants. (See pages 190, 278, 279, 314, 315, 319, 320, etc.)

The decree provides that upon the foreclosure sale the property shall not be withdrawn from the jurisdiction of the court, even though it should be delivered to the purchasers, until all claims of every character against the property or against the receivers shall be fully paid and discharged. (Record, p. 312.) A like provision is made in the order confirming the sale (Record, p. 317), and in the order for the delivery of the property to the purchasers. (Record, pp. 319, 321, 325.) So that the corporation which to-day holds and operates the Wabash Railway does so under the express condition that the entire property is still liable to any claims which may be found due from the receivers to any party.

V. *The Wabash Company paid all its interest until May, 1884.*

There was no default in payment of any interest on the General Mortgage bonds until June, 1884; and no default in payment of the interest on any of its bonds until May, 1884, when the interest on the comparatively small amount of collateral bonds was passed. These facts appear from the bill of complaint filed by the Wabash, from the decree of foreclosure, and from the petition filed by the receivers on June, 26th, 1884. (See Record, pp. 230, 246, 290, 291.)

pelled to adopt such lease, yet if they do adopt it they

ARGUMENT.

In making application of the legal principles governing the questions involved in this appeal, it is important to keep in mind that on May 29, 1884, only one of the parties to our lease was clothed with the right and power to exercise a choice as to its future status. The application for the appointment of receivers found appellant in the position of a lessor which had surrendered to its lessee all its property for a fixed term. If the Wabash Company had continued to be a going concern, that company would have been bound to pay appellant its rents until the end of that term. On the other hand, there was no way by which appellant could have terminated the lease or recovered possession of its property, so long as the covenants of the lease were observed by the lessee.

When the property passed into the hands of the receivers, appellant's position remained unchanged. It was still bound by the lease. It had neither the right nor the power to exercise a choice. However cogent might have been its reasons for desiring possession of its property, it could not say to the receivers: We will terminate the lease. It was equally precluded from saying to the receivers: We insist that you shall assume this lease and perform its covenants.

But this choice, which was denied to the appellant, did rest with the receivers. They could adopt the lease, or they could repudiate it. If the receivers had decided to repudiate it, and had refused to take possession of, and to operate appellant's road, appellant would have been compelled to submit. When they did decide to adopt the

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lease and to continue the operation of the road, appellant's position was still that of simple acquiescence.

Our position was, therefore, a purely passive one; we had no power nor right to act in either way. Upon the receivers was cast the responsibility of acting. They did act; and appellant, as it was bound to do, submitted.

That party having acted upon whom rested the responsibility of action, and the passive party having acquiesced, as it was bound to do, the question to be determined on this appeal is, whether the party who acted shall be permitted to repudiate such action to the detriment of the party whose attitude was passive.

It would seem that there could be but one answer to this question, unless there exists in a court of equity the power to adopt all that is beneficial in a contract, and repudiate all that is burdensome. For the action of the receivers was on two several occasions (Record, pp. 239, 240, and p. 257) expressly sanctioned by the court which appointed them. If the action of the receivers in refusing to be bound by the convenant of the lease as to payment of rent is sustained, there is an end to the sacredness of contractual obligations.

I. *The receivers adopted appellant's lease.*

1. The action of the receivers and of the court, in May and June, 1884, can not be regarded in any other light than as an adoption by the receivers of the lease and an assumption of its covenants. The law is well settled, and it was at that time well settled, that while persons upon whom a lease devolves in a trust capacity, or for the benefit of third parties, or by operation of law, are not compelled to adopt such lease, yet if they do adopt it they

are bound by all its covenants. The authorities to this effect are uniform.

Turner v. *Richardson*, 7 East, 335, 344;
Hoyt v. *Stoddard*, 2 Allen, 442;
Boyce v. *Bakewell*, 27 Mo. 492;
Hanson v. *Stevenson*, 1 B. & A. 303;
Thomas v. *Pemberton*, 7 Taunt. 206;
Ex parte Paxon, 1 Lowell, 402;
Pugsley v. *Aikin*, 11 N. Y. 494.

Says Jones, L. J.:—

"If the company, for its own purposes, and with a view to the realization of the property to better advantage, remains in possession of the estate which the lessor, therefore, is not able to obtain possession of, common sense and ordinary justice require the court to see that the landlord receives the full value of the property."

In re Lundy Granite Co., 6 Ch. App. 466.

And this language is expressly approved by Fry, J. in *In re Silkstone Coal & Iron Co.*, 17 Ch. Div. 160.

Lord Justice Mellish adds in the *Grundy* case (*supra*):—

"If the official liquidator, for the convenience of the winding up, does not surrender the lease, but continues to keep possession for the purpose of obtaining a better price for the goods, the landlord should not be deprived of his right to recover his rent." (6 Ch. App. 467.)

And he expresses the opinion that even a legislative act would not be construed to take away this right without clear and express words to that effect.

In *Woodruff* v. *Erie Railway Co.* (93 N. Y., 609, 623) the Court of Appeals of New York says:

"The receiver was not only thus authorized to assume the obligations of the lease and to bind the estate in his hands to the payment of the rent accruing thereon, but by entering into the possession of and occupying such leased property, he manifested by an unequivocal act his election to regard the continuance of such lease *as bene-*

ficial for all of the parties interested, and his intention to continue the interest acquired by the Erie Railway Company under such lease. He could not take possessiou of the property and enjoy its use and occupation *without incurring a liability for the payment of the rent under the lease* by which his predecessor secured its possession. The principles which govern the liability of an assignee of a lease seem to be applicable to the case of a receiver, and he would be equitably and legally chargeable with the payment of rent under a lease for such time as he continued to occupy the property demised."

In our case both the court and the receivers "by an unequivocal act" manifested their election to regard the "continuance of the lease as beneficial for all the parties interested." The receivers knew all about the condition of our property; and by making no objection to the order of the court, they "unequivocally" expressed the opinion that the order was proper. The mortgagees did the same by their express assent to the order. If the act of the receivers in taking possession of our road in the first instance was not conclusive, the continued operation by them of the road after we had filed our intervening petition claiming rent under the lease, was so.

We apprehend that even had the receivers immediately upon their appointment asked to be relieved of this lease, the court, in the absence of any complaint upon the part of the the trustees, or bondholders, would have hesitated to comply with such request. To such an application by the receivers alone the answer would naturally be, that so long as the parties most interested, who were also parties to the record, acquiesced in the order it was not for the receivers to move for its rescision. But, as a matter of fact, the acquiescence of the receivers was as marked and complete as that of the parties interested.

2. Only slight evidence of an adoption is required. In many of the cases the acts were apparently of little moment. But whether in themselves of great or little consequence, if they manifest an intention to use the leased premises as a part of the estate which they are administering as receivers, this is sufficient.

Thus in *Welch* v. *Myers* (4 Camp. 268) the assignees of a bankrupt were chosen on Saturday. The bankrupt was tenant of a pasture in which were certain cows belonging to him. The assignees allowed the cows to remain in the pasture over Sunday, on which day they were twice milked by their order; but they removed them early on Monday morning. It was contended in behalf of the asignees that there was no evidence of a holding by the assignees; that they had a right to a reasonable time to determine whether they would take to the demise or not; that having been appointed themselves only on Saturday, and having removed the cows on Monday morning, they must be considered as having repudiated the bankrupt's interest in the premises. But it was held by Lord Ellenborough that the milking of the cows on Sunday upon the premises by order of the assignees was a sufficient adoption of the demise to make them liable as tenants.

The same learned judge says in *Hanson* v. *Stevenson*, (1 B. & Ald., 307) that he "knew of no instance in which a deliberate act of taking possession has been curtailed of its full legal effect."

In the *Oak Pits Colliery Company's* case (L. R. 21 Ch. Div. 330) the court says it is sufficient to hold the liquidator as tenant if he keeps the property simply for the purpose of "doing the best he can with it." In this decision the distinction between cases where the receiver is held to adopt the lease, and where he is not so held, is clearly presented. The mere fact that he abstains from any effort to get rid of the lease, in other words, that he is

merely passive, will not make him liable. But if he takes any active steps, though they be slight ones, he is held.

The Supreme court of Alabama holds that taking possession of the leasehold estate and holding it for the benefit of the estate which the receiver is administering, though for ever so short a time, is the true test.

Dorrance v. *Jones*, 27 Ala. 633.

In that case the assignee took possession of the leased store and used it as a place in which to sell goods.

In *Thomas* v. *Pemberton* (7 Taunt. 206) one of the assignees, when notice to quit was served upon him, said he expected it. The other said, on one occasion, that he had nothing to do with the farm but to pay the rent. The assignees actually kept possession of the farm until the time mentioned in the notice to quit, and at least one of them occasionally gave orders to the men at work on it. These acts were held sufficient to show an election to take to the farm.

In the *Bridgewater Engineering Company's* case (18 Ch. Div. 181), where the liquidator retained possession of the leased property merely for the purpose of selling the machinery, plant and chattels which were on the premises, the court declined to hold that he had adopted the lease. This case goes as far as any of which we are aware to relieve the receiver. And it is questionable whether the court would have so held had there not been circumstances which strongly indicated that the leased property had been retained as much for the benefit of the landlord as of the tenant. See page , *post*.

Even though the receiver may say that he does not intend to adopt the lease, and puts his refusal in writing, nevertheless, if he does anything by way of using the premises, which he would have no right to do except as the assignee of the lease, he will be held to have adopted it. Says Abbot, C. J.:

"Although an assignee in words or in writing declares his intention to refuse the estate, yet if in fact he takes advantage of it, he is not relieved from the charges incident to it. A mere nominal dissent is not sufficient; it must be one in fact and in substance. If you think the defendant did take to these premises, and carry on the trade there for the benefit of the creditors, he has done more than the law allows an assignee to do before he exercises his right of declaring off. A reasonable time is permitted for that purpose; but no case has gone so far as to say that an assignee may continue to trade for the benefit of the creditors and after that refuse."

Clark v. *Hume*, Ry. & Moo., 207, 209.

And the fact must not be overlooked that the receivers adopted our lease with full knowledge of the condition and earning capacity of the property. (See statement, page— *ante.*)

3. This rule which in the above cases has been held to apply to executors, assignees in bankruptcy or insolvency, to assignees for the benefit of creditors, and to liquidators of corporations, is equally applicable to receivers. To this effect are all the authorities. We have been unable to find any decision to the contrary. Indeed we can conceive no reason why an exception should be made in the case of receivers.

The court below did not attempt to draw any distinction between receivers and the other classes referred to by the authorities. Notwithstanding the fact that counsel in their argument insisted upon such a distinction, none of the judges composing that court, neither the circuit judge, nor either of the two district judges before whom this case came during its various stages, intimated that such a distinction existed, but they repeatedly recognized the rule as applying to receivers as well as others. See Record, pp. 213, where the court says: "Such taking possession is an

acceptance of the lease and binds the receiver *as assignee.*" See also pp. 218, 219. That the rule applies to receivers, is held in:

In re Brown, 3 Edw. Ch. 384;
Martin v. *Black*, 9 Paige, 641;
Commonwealth v *Insurance Co.*, 115 Mass. 278;
Woodruff v. *Railway Co.*, 93 N. Y. 609;
People v. *Insurance Co.*, 30 Hum. 142;
Gibert v. *Railroad Co.*, 33 Gratt. 586;
Miltenberger v. *Railroad Co.*, 106 U. S. 286;
Fosdick v. *Schall*, 99 U. S. 235;
Union Trust Co. v. *Ill. Mid. Railway Co.*, 117 U. S. 434, 475;
Kneeland v. *Amer. L & T. Co.*, 136 U. S. 89; S. C. L. Ed. Book 34, p. 379; 43 A. & E. R. Cas. 519;
Turner v. *Railroad Co.*, 8 Reporter, 453;
Easton v. *Houston & Tex. Cent. Ry. Co.*, 38 Fed. Rep. 784;
Welch v. *Myers*, 4 Camp. 368;
In re Lundy Granite Co., 6 Ch. App. 462;
In re North Yorkshire Iron Co. 7 Ch. Div. 661;
In re Engineering Co., 12 Ch Div. 181;
In re Silkstone Iron Co., 17 Ch. Div. 158;
In re Co-operative Stores, id. 161;
In re Brown, 18 Ch. Div. 649;
In re Oak Pits Colliery Co., L. R. 21 Ch. Div. 322;

It will be observed that some of the cases cited above are cases of winding up under the English statutes and the person adopting the lease is called "a liquidator." These officers are substantially the same as receivers. The official liquidator under the "Companies Act" of Great Britain is to all intents and purposes a receiver. The powers confered upon him and the duties to be performed by him correspond to those confered upon and to be performed by receivers appointed by courts in the exercise of their general equitable jurisdiction.

See 25 & 26 Vict. c. 89, sec. 92-97.

II. *The receiver of a railroad company occupies no different position from the receiver of any other corporation or of an individual.*

It was urged in argument below that a railroad lease stands upon a different footing, so far as it involves the question now at issue, from an ordinary lease, or from the lease of other kinds of property. The argument is that a railroad being a public highway, and operated for public benefit, public policy requires that it shall be kept in operation; and it is incumbent upon the court when it takes charge of railroad property through its receivers to see that all parts of the property, whether owned or leased, are kept in operation for public use, while no such necessity exists as to ordinary leasehold property. If this were true, it does not relieve the receivers from their obligation to pay rent so long as they do operate it. But we think the argument is more specious than sound.

The Supreme court of Texas, in a well reasoned case, refuses to accede to this view, holding that receivers of railroad property stand in the same attitude as those having charge of the property of an individual or a private corporation.

"A receiver," says the court, "as a general rule is but the agent of the court that appoints him with authority to take the possession and control of property, the subject matter of litigation. * * * He is liable as receiver for his contracts made in his official capacity and for the torts committed by his servants and agents in the operation of the road. By reason of the liability incurred by the operation of so much machinery and the employment of so many men, it may seem upon first blush that their liability is defined by a different rule from that which prescribes the liability of receivers in ordinary cases. But the rule is the same."

Brown v. *Warner*, 14 S. W. Rep. 1033.

Such, too, is the doctrine recognized by this court in

the *Kneeland* case, where, speaking through Mr. Justice Brewer, it says:

"So, if at the instance of any party rightfully entitled thereto, a court should appoint a receiver of property, the same being railroad property, and therefore under an obligation to the public of continued operation, it, in the administration of such receivership, might rightfully contract debts necessary for the operation of the road, either for labor, supplies *or rentals*, and make such expenses a prior lien upon the property itself."

Kneeland v. *Amer. Loan and Trust Co.*, 136 U. S. 89, 98; L. Ed. Book 34, p. 383; 43 A. & E. R. Cas., 527.

A railroad case was decided by Pardee, J., in the Circuit court for the Eastern District of Texas, in which the order appointing the receivers was not so full and pointed as in the case at bar. That order read as follows:

"To take possession of the money and assets, real and personal, road-bed, road, iron, ties, lands, rights of way, rolling-stock, leases, franchises, and all other rights of property whatsoever, of the said H. & T. C. Railroad Company, wherever the same may be found, with power to manage, control and exercise all the franchises whatsoever of the said railroad company, and in the meantime, and until another order of this court be rendered, to run, operate and manage the railways of the said defendant railway company, and to manage and control all of the said property and affairs of the said defendant railroad company."

The Court says:

"Under this authority, the receivers, with full knowledge of the obligations of the railway company, and the condition of the property furnished thereunder, did take possession of the lease and leased property, and operated the same, enjoying the privileges thereof, and all for the benefit of the trust fund. It would seem that under this state of facts, the receivers, fully authorized thereto, became the assignees of the railway company, and thereby legally and equitably *obligated themselves to perform the several covenants undertaken by the company* as to the care

and return of the leased property. The lease in question was an entirety; of necessity the assignment or assumption thereof was of the whole, and not of any particular part."

Easton v. *H. & T. C. Ry. Co.*, 38 Fed. Rep. 784.

Still, if all that is urged in this behalf by respondents be granted, we can not see that it furnishes any ground for denying, curtailing or injuriously affecting the rights of the lessor. That question was one to be considered by the court in the first instance in determining whether it would grant the prayer for the appointment of receivers. It was certainly incumbent upon the court before making such appointment to consider whether it would be for the benefit of parties affected by the bill that its receivers should take any leasehold which might constitute a part of the property of which it was asked to take charge through its receivers. And if it should appear that the receivers could not take charge of the property without incurring an obligation to continue the operation of its leased lines, that fact should have had its weight in determining the propriety of making the appointment.

Where the bill is filled and the application for receivers made by bondholders or mortgagees, it is the uniform holding of this court that the receivers appointed upon such application take the property *cum onere*; that if the mortgagees ask for receivers to take charge of and operate the property, they will be held impliedly to assent that such receivers may adopt the leases. Why should not the same principle hold, why not the same rule obtain, when the application is made by a party other than the mortgagee or bondholder, whether such party be the insolvent corporation itself, a judgment creditor, or some other party in interest? If the court, upon examining into the matter, finds that the property is burdened with such leases that it would

be unfair and unjust to other parties that the receivers should operate the roads leased, and yet that public policy required their continued operation, ought not the court to decline the application? Has not the lessor the right to suppose that the court, before granting the prayer, gave due consideration to these circumstances? Ought not the Supreme court to assume that all these matters were duly weighed by the Circuit court before it decided to take charge of and operate the road through its receivers?

III. *Positions taken by counsel for receivers in the court below examined.*

The principle announced in the cases we have cited, and the undisputed rule that where an assignee, liquidator or receiver intermeddles with the leased property, or keeps it for purposes connected with the administration of the estate, he becomes liable on the covenants of the lease, must, it seems to us, result in the reversal of the decree entered by the court below. The receivers certainly did intermeddle with our property; they certainly did use it for the purpose of carrying on the business of the estate which they were administering. Not only was there no request on the part of appellant that this should be done, but the property was taken possession of and the operation commenced without its knowledge. It was done for the benefit of the creditors of the Wabash Company, especially for the benefit of the mortgagees. It was done with the full knowledge and express consent of the mortgagees. We cannot conceive of any stronger case that can be presented. We confess that we are at a loss to understand upon what theory the court below declined to allow our claim for rent. The case was argued below by counsel of distinguished ability. It was decided by a court for which we have the highest respect. But we are compelled to say

with entire frankness that, after a most painstaking examination of the printed argument of counsel before the Circuit Court and of the opinions of the two judges who decided the case, we have been unable to find any valid ground upon which the decree in question can be sustained.

Two grounds were suggested by counsel below for the rejection of our demand. One was that appellant was a party to the suit instituted by the Wabash Company, and thus in some mysterious way lost its standing as lessor. The other was that the lease conferred no lien on the lessee's property, or, if it did give a lien, such lien was inferior and subject to the lien of the general mortgage and the various other mortgages upon the Wabash system and its component parts. The first of these involves a misapprehension of fact; the second a misapprehension of the legal propositions advanced by appellant.

1. We say the first ground, viz.: that appellant was a party to the suit instituted by the Wabash Company, is not true as a matter of fact. Though if it were true, we cannot see how it would affect the question at issue.

(*a*) When we say that it is not true that appellant was a party to the proceeding instituted by the Wabash Company, we do not wish to be understood as asserting that the Wabash Company did not attempt to make us a party. Appellant was undoubtedly named as one of the defendants. But it was not a party in fact, and could not be. The bill was filed by a corporation organized under the laws of Missouri and a citizen of that State. Appellant was a corporation of the State of Missouri and a citizen of that State. It is useless to argue so plain a proposition as that one citizen of a State cannot sue another citizen of that same State in the Federal court, unless the subject-matter of the suit is of a nature to confer jurisdiction upon the Federal court without regard to the citizenship of the parties.

Even had appellant appeared and recognized the jurisdiction of the Circuit Court, that court would not thereby have acquired jurisdiction over defendant. We presume it may be admitted that the Central Trust Company did, by entering its appearance and filing its answer, waive any objection to being sued in a district other than that of its residence, and that as between the Wabash Company and the Central Trust Company the court below had juisdiction. But it had no jurisdiction in that suit over a citizen of Missouri, though the latter may have entered an appearance and filed an answer.

This objection is not waived by failing to raise the question by a plea in abatement. Says Mr. *Justice* Field in *Susquehanna &c. Coal Co. v. Blatchford* (11 Wall. 172): —

"The case was not one were a plea in abatement was required to raise the question of citizenship. Here the citizenship of the parties was averred in the bill of complaint and the consequent defect in the jurisdiction of the court is apparent, and a defect of this character thus disclosed may be reached on demurrer, or taken advantage of without demurrer on motion at any stage of the proceedings. A plea in abatement is required only where the citizenship averred is such as to support the jurisdiction of the court and the defendant desires to controvert the averment. The question of citizenship constitutes no part of the issue upon the merits."

In the case at bar it not only appears from the allegations of the bill (Record, pp. 234–238), but it is shown over and over again in the record, that the Wabash Company and appellant were citizens of the same State. It is only by treating the proceeding as a foreclosure suit brought by the trustees of the general mortgage, who were citizens of a State other than Missouri, that it can be held that the court below acquired jurisdiction over appellant.

But the fact is appellant never did appear in the suit instituted by the Wabash Company. Its earliest appearance

in the Circuit Court was when it came as a stranger to the proceeding already instituted, and filed therein its intervening petition, asking that its rental be paid. It was at a later date made a party defendant in the suit filed in the State Court by the Central Trust Company and James Cheney. Whether by the removal of the last mentioned case into the Federal court the cause was transferred to that court so far as appellant was concerned, might be questioned. Counsel for appellant, without attempting to decide that question, thought it wise to file an answer, and did so on October 2, 1885, several months after the cause came into the Federal court by removal. But that answer was filed in the case of *Central Trust Company, of New York* vs. *Wabash, St. Louis & Pacific Railway Company*, and not in the case originally brought by the Wabash Company. (Record p. 277.)

It appears from the allegations of the bill filed by the Wabash Company that the idea was not entertained that jurisdiction could be acquired in that suit over this appellant. A paragraph near the close of the bill reads as follows: —

"And your orator avers that there is in this cause a dispute and controversy wholly between your orator and the said trustees under said general trust mortgage, and there is also a separate dispute and controversy in this cause wholly between orator and the trustees under the said several other mortgages herein set forth and that such controversy may be determined as between orator and the trustees under each of said mortgages without reference to the other defendants herein." (Record, pp. 234–235.)

We stand, therefore, as strangers to the original suit. We were not a party to it until after the trustees in the general mortgage had prayed for the foreclosure thereof, and for the appointment of receivers. We then appeared for the purpose of demanding the rental to which we were en-

titled, the receivers having adopted our lease and used our road.

(*b*) But if it be conceded that appellant was a party to the suit instituted by the Wabash Company, we emphatically deny that any such legal result would follow as was contended for by counsel in the court below. It would be a most startling proposition that leased property could be retained, so that all the benefits should be derived from the lease without the assumption of any of its burdens, by the simple process of filing a bill against the creditors, secured and unsecured, of the lessee, making the lessor a nominal party defendant, and having the property placed in the hands of receivers. This would be a novel but very effectual way of taking lessor's property without compensation for the benefit of the lessee's creditors.

In *Turner* v. *Railroad Co.* (8 Reporter, 453) the circuit judge for the seventh circuit held that the lessor was a party to the proceeding in the Federal court. But it does not seem to have occurred to him that such fact furnished any reason for declining to order the receiver to make payment of full rental, as well as damages for misuse of the leased rolling stock.

2. As to the second position taken by counsel in the court below, appellant has never claimed a lien, prior or otherwise, upon the property of the Wabash Company. We have always claimed, as we claim now, that the rental of our line was a part of the operating expenses of the system, as much so as the rental of a room for a ticket office would be; that it was an expense which the receivers were as much bound to pay as the lessee would have been had no receivers been appointed; and that, if there was not sufficient income, it should be paid from the proceeds of

the foreclosure sale. While the property was operated by the lessee, it did not concern us from what source the funds came with which our rental was paid. When the receivers adopted the lease, and operated our line, it did not concern us from what source the money should come to pay our rental. The court below had no difficulty in obtaining money to pay all the other expenses of the receivers. It would have had no difficulty in obtaining money to pay our rental. The means of payment are fully provided for in the final decree, in the deed to the purchasers at the foreclosure sale, in the order confirming the foreclosure sale, and in the order for delivery of the property to the purchasers. (See statement, *ante*; p. 27.) And the purchasers were and are subject to the judisdiction of the court. *Kneeland* v *Amer. L. & T. Co.*, 136 U. S. 89.

While we claim no lien, in the strict sense of that term, we do insist, as we always have insisted, that this rental, like all other expenses incurred by the receivers, takes precedence of the general mortgage and all other mortgages. But this is not placed upon the ground that our lease gives us a lien, but on the ground that the receivers as our lessees are liable for the rent, and that no mortgagee can ask to have any money paid to it until this rent has been paid. We will discuss this point more fully under the next head.

IV. *Grounds of the decision of the court below examined.*

1. Opinion of the circuit judge.

It is not necessary to note further the positions taken by counsel in the court below, as it does not follow that the the same grounds will be urged by them in this court. It is of more importance to consider the grounds upon which the circuit court based its decree.

(*a*) They state appe llant's position as follows: —

"The intervenor's claim, of course, is that the rentals due them are preferential debts and should be paid prior to the mortgages." (Record, p. 213.)

That we may be clearly understood on this point, we repeat what we have stated above; we do consider our claim for rental to be a claim prior to that of any mortgagee, just as any expense incurred by the receivers is a debt to be preferred to the mortgage debts. We say again: The receivers became our lessees, and we look to them to pay our rent. No mortgagee has a right to ask that one dollar be applied to the payment of the bonds secured by the mortgages until the receivers have paid our rent in full.

(*b*) That the view taken by the judges below may be fully understood, we shall make somewhat copious extracts from their opinions. On page 213, the circuit judge says: —

"We start with this fact, that prior to the appointment of the receivers, intervenor's claim was subordinate to that of the mortgagees. It was a claim, of course, good against the income, but not against the corpus; at least not good against the corpus until after the payment of the mortgages. And the first question is whether the action of the receivers in taking possession, or of the court in ordering possession, changed the status, and gives to intervenor's claim a higher position than it theretofore had."

Now, there certainly must have been in the mind of the court when writing this part of the opinion a misapprehension as to the facts. No claim on the part of intervenor existed prior to the appointment of the receivers. Its accrued rent had been paid to the end of the half-year preceding May 29, 1884, and no further rent became due until the first of September following the receivers' appointment. Consequently, there was no status to be changed by the appointment of the receivers, since there was no claim then existing to be affected by such appointment. The only claim we have is against the receivers. It accrued

due after they were appointed, and because they had become our lessees. Taking, as they did, in the middle of the half-year, they were liable for the rent of that half-year, as we shall show at a later stage of this argument. But we are not in the attitude of creditors seeking to enforce a debt which existed against the Wabash Company at the time the receivers were appointed.

The debt which the receivers incurred, we do insist, should be paid out of the corpus, if the income is insufficient. This rent was an expense of administration of the estate committed to their charge, and justice requires its payment. That not only the income is liable for the rentals, but the corpus also, in case the income is insufficient, is settled by the decision of this court in the *Illinois Midland* case, where Mr. Justice Blatchford says:—

"Of course such items are payable out of income, if any, before the corpus is resorted to; but that may be resorted to when the items are proper ones to be allowed for operating expenses, after scrutiny and opportunity for those opposing to be heard."

Union Trust Co. v. *Ill. Mid. R. R. Co.*, 117 U. S. 434, 464.

And in a preceding portion of his opinion he says that the bondholders have no ground of complaint if the court below charges "*upon the property*" such expenditures as appear to have been rightfully made by the receivers (p. 461).

It was also held that the power of the court to order such payment out of the corpus was not affected by any limitations contained in the original order appointing the receivers.

The same view was taken, though not so fully expressed, in the earlier case of *Miltenberger* v. *Railroad Co.*, 106 U. S. 285, 304–5.

The rule applied in the *Illinois Midland* case to receivers'

certificates equally applies to the debt incurred in this case for rentals. Says Mr. Justice Blatchford:—

"Nor have the bondholders any ground of complaint, if the court charges upon the property such expenditures as now appear to have been rightfully made in the interest of all concerned in its management while in the hands of the receiver. As to receivers' certificates issued with the sanction of the court, after the trustees became parties, the purchasers and holders should be accorded such rights as, by the settled principles of equity, are accorded to those who deal with judicial tribunals having jurisdiction in the premises."

Union Trust Co. v. *Ill. Mid. R. R. Co.*, 117 U. S. 434, 461.

There surely is no ground upon which the holder of a receiver's certificate can claim superior equities to those of the lessor of a railroad which receivers have taken into their possession and operated. The lessor, equally with the holder of a receiver's certificate, has dealt with a "judicial tribunal having jurisdiction in the premises." The lessor, equally with the holder of the certificate, is an innocent party, relying in good faith upon the action taken by the court through its receivers, and is in the highest degree entitled to be dealt with fairly and equitably.

We think the rule laid down in the *Fosdick* case (99 U. S. 235) applies to the claim of appellant. The terms of our lease made it imperative upon the lessee to put and keep the leased road in proper condition. This the lessee never did (see statement, pp. 2 and 11, *ante*). Had it performed this obligation, it would have laid out upon our road, prior to the appointment of the receivers, at least $100,000 more than it did. This sum, which we had every right to demand should be expended upon the road, was used by lessee to pay the interest on the bonds of the parties now seeking to foreclose their mortgages. All the interest that had matured down to the date of

the appointment of the receivers was paid in full (see statement, p. 28, *ante*), and it was paid in part, at least, with money that should have been laid out on appellant's line. By reason of the failure of lessee to keep this convenant of the lessee, by reason of its using in the payment of interest on the bonds the moneys that should have been appropriated to the purposes of repair and renewal of the leased property, there devolved upon the receivers a necessity to expend over and above legitimate operating expenses, a sum largely in excess of our rental. In other words, had lessee done its duty, had it not diverted the funds to the payment of interest on the bonds, the expenditures necessarily laid out by the receivers on appellant's road would have been sufficiently diminished to have paid our rent, or at least a large portion of it. This brings our case fully within the principle upon which the decisions above cited rest. We are entitled first to payment from the earnings in the hands of the receivers. No one else is shown to have any claim on them superior in equity to ours. Should it appear that such earnings are insufficient to pay our rent, payment should then be made out of the proceeds of the sale, in preference to any application of such proceeds to payment of the mortgage bonds.

It will be observed that in the order of May 29th the court did not limit the fund out of which the rent was to be paid to the income. The direction is to pay out of the income "or otherwise."

Mr. High puts all the expenses incurred by receivers on an equal footing. He says: —

"As to rights of action which may be maintained against receivers, they are in general the same which may have been maintained against the person to whose estate and rights the receiver succeeds." (*High on Rec.*, Sec. 395.)

That is, the receivers stand *pro hac vice*, as to expenses

incurred while they are in charge, in place of the corporation itself. This rent is one of those expenses. And the justice of our claim can no more be disputed than could that of any other class of expenses mentioned.

It is held by the South Carolina courts that a claim for damages arising from injuries received while the road is in the hands of a receiver is a debt arising in the operation of the road. (*Ex parte Brown*, 15 So. Car. 518.) So the courts of Kentucky have held (*Douglas* v. *Cline*, 12 Bush, 609), and other courts, both State and Federal. (*Cowdrey* v. *Railway Co.*, 93 U. S. 352.) This court, in commenting upon the *Cowdrey* case, says: "This puts claims against the receiver in his capacity as a common carrier on the same footing precisely as the salary of his subordinates, or as claims for labor and material used in carrying on the business." (*Barton* v. *Barbour*, 104 U. S. 126.) Surely such claims possess no greater merit than one for rent of a road which is operated by a receiver.

Nor is the claim for services of counsel more meritorious than one for rent. Yet such claim has frequently been allowed under orders similar to that made by the court below.

See cases above cited, also

Baylis v. *Railroad Company* (U. S. C. C. Ind.), 8 Rep. 579;

Turney v. *Railroad Company*, 58 N. Y. 358.

The English courts find no difficulty in holding the rent to be a part of the operating expenses. In one case where offices had been let to a company which was ordered to be wound up, and the liquidator had for the purpose of administration retained possession of the offices, the court said that such rent was a part of the administration expenses.

In re Progress Assurance Co., L. R. 9 Eq. 370.

Lindley, L. J., says, *In re Oak Pits Colliery Co.*, (L. R. 21 Ch. Div. 330):—

"If the liquidator has retained possession for the purposes of the winding up, or if he has used the property for carrying on the company's business, or has kept the property in order to sell it *or to do the best he can with it*, the landlord will be allowed to distrain for rent which has become due since the winding up."

And he says further:—

"When the liquidator retains the property for the purpose of advantageously disposing of it, or when he continues to use it, the rent of it ought to be regarded as a debt contracted for the purpose of winding up the company, and ought to be paid in full *like any other debt or expenses* properly incurred by the liquidator for the same purpose."

And that the value of the leasehold does not affect this question, appears from the remaining portion of the paragraph from which we have just quoted.

"In such a case," he says, "it appears to us that the rent for the whole period during which the property was so retained ought to be paid in full, without reference to the *amount which could be realized by a distress*."

The Supreme Court of New York takes the same view. In *People v. Insurance Co.* (30 Hun, 142), they say that in such a case the rent "would not be a claim to be paid *pro rata* with debts of the company; it would be like his (the receiver's) necessary expenses, *a charge on the fund*."

(*c*) To the following language of the circuit judge we take no exception:—

"The idea which underlies this bill is that which underlies the action of a voluntary bankrupt under the bankrupt law. Finding himself insolvent, he surrenders his property to the court to be disposed of for the benefit of his various creditors. Such action in no manner changes the relative rights of his various creditors. They stand sub-

sequent to this action as they did before, and their various rights and equities are determined, not by his action in surrendering his property to the custody of the court, but by the terms and obligations of the contracts theretofore entered into." (Record, pp. 214, 215.)

We are entirely content to stand upon the doctrine here announced. An unsecured creditor of a bankrupt could not expect that his debt should be changed to a secured one by the facts of the bankruptcy and the appointment of an assignee. And this applies to a lessor of the bankrupt, so far as the rent due at the time of the bankruptcy is in question. But such lessor would expect to be paid his future rent in full, in case the bankrupt's assignee took possession of the leased property. So in the case at bar, if the Wabash Company had failed to pay the rent accruing before the half-year in which the receivers were appointed, appellant would have stood, so far as that rent is concerned, in the attitude of an unsecured creditor; and would not expect that debt to be paid in preference to the mortgage debts. But coming into court, as we have, to recover rent accruing after the appointment of the receivers, and after they had taken possession of our property and adopted our lease, we do expect it to be paid in full, on the same ground that an assignee in bankruptcy who had adopted the lease would be expected to pay the rent.

It happens that this identical question has come before the English courts on more than one occasion, and the distinction has been uniformly recognized and declared. It is expressed by Fry, J., in the following terse language:—

"It is hardly in controversy between the parties that, roughly speaking, the rent which accrued before the liquidation should be matter of proof, and the subsequent rent a matter of full payment."

In re South Kensington Co-op. Stores, 17 Ch. Div. 164.

And in a later case he uses the following language:—

"Those are the two principles to be considered. In

their generality they are manifestly inconsistent. In my view they are to be reconciled by drawing the line at the date of the winding up.

A mortgagee and a lessor, although in one sense independent persons, are, nevertheless, creditors of the company in respect to any amount due on the mortgage or lease at the date of the winding up, and as such creditors, they ought, in my judgment, to have neither preference nor priority. In respect to any rights arising after the winding up, by reason of the company or the liquidators remaining in possession of the demised or mortgaged premises, they must so remain upon the terms and conditions of the instrument; just as any other person must observe those terms." *In re Brown*, 18 Ch. Div. 652.

[This placing the mortgagee and the lessor in the same class is explained by the particular facts of that case. The winding up was a voluntary one on the part of the company. Prior to the resolution that the winding up be had, the company had executed a mortgage on a portion of its property, which mortgage contained a provision giving the trustees a right to enter upon the property of the company and distrain certain chattels there which were not covered by the mortgage itself. It was with reference to this right of distraint that the learned judge used the language above quoted.]

The same view is taken in *In re North Yorkshire Iron Co.*, 7 Ch. Div. 664.

So in the *Oak Pits Colliery Company's* case (L. R. 21 Ch. Div. 322), it was held that as to the rent in arrear at the commencement of the winding up, the landlord had only the remedy of other ordinary creditors. But as to the rent accruing after the commencement of the winding up the landlord was entitled to be paid in full.

(*d.*) The court below correctly says (Record, p. 213) that appellant strenuously insists that the receivers by taking possession of its road became virtually the assignees of

the lease, and bound by its terms; and that they were so bound that the entire Wabash property was liable for the payment of the rent, in preference to the lien of the mortgages.

We think all the authorities announce this doctrine, and that no other rule has ever been suggested in cases of this character. The principle upon which we rely is clearly stated by the circuit judge in the closing part of the paragraph from which we have just quoted, and which reads as follows:—

"Where a mortgagee institutes foreclosure proceedings, and upon his application a receiver is appointed, and such receiver takes possession of property leased by the mortgagor, *such taking of possession is an acceptance of the lease and binds the receiver as assignee*, and binds so as to concede a *preference* to the lessor in respect *to his rental*. In other words; if A., a mortgagee, commences foreclosure proceedings against B., a mortgagor, and a receiver, appointed at his instance, takes possession of the property of C., leased by B., *such possession of the leased property is an acceptance by the receiver of the lease, makes him an assignee of the lessee, and binds both him and A., the mortgagee, to the full amount of the mortgaged property, to the payment of the rents.*" (Record, p. 213.)

This language describes the precise attitude in which appellant stands. We have nothing to do with the fact that the receivers were at first appointed at the instance of the mortgagor. The fact remains that they were appointed because the mortgagor satisfied the court that the interests of all the then existing creditors of the Wabash Company demanded their appointment. The appointment was made, therefore, not for our benefit, since appellant was not a creditor of the Wabash Company, the Wabash Company owing us nothing at that time.

Though the appointment was not made in the first instance at the instigation of the mortgagees, nor, perhaps in the sole interest of the mortgagees, yet this fact does not at

all change the character of the proceeding. It appears from the bill that its sole ultimate object was that there should be a foreclosure. (Record, pp. 232–233.) And, *within two weeks* after the bill was filed by the Wabash Company, the trustees in the general mortgage came into court with their cross-bill, praying for the foreclosure of their mortgage and the appointment of receivers. (Rec., p. 241.) Nor does the fact that new receivers were not appointed at their instance affect the question, since the court considered that the receivers already appointed were practically acting for the mortgagees (Record, p. 243), and they held possession for their benefit until the foreclosure sale. From the date of filing the cross bill, June 9, 1884, the proceeding was one to all intents and purposes by a mortgagee against a mortgagor. The decree of foreclosure expressly excludes the bill filed by the Wabash Company, and is based solely upon the bills and cross-bills filed by the mortgagees. (Record, p. 282.)

In view of these facts, the case of *Kneeland* v. *American Loan and Trust Company* (136 U. S. 89; L. Ed. Bk. 34, p. 379; 43 A. & E. R. Cas. 519), is one of exceeding importance. There the original bill was filed and application made for a receiver by a judgment creditor. Several months afterwards the trustee in the mortgage came in and prayed for a foreclosure and also asked the appointment of a receiver. The mortgagees appeared to the original bill, and neither objected nor consented to the appointment of the original receiver; but when they asked for a foreclosure and the appointment of a new receiver, their prayer on both points was granted.

The only points of difference between that case and the one at bar are that in our case the mortgagees, instead of waiting for four months, came in immediately with their cross-bill, praying for a foreclosure and the appointment of receivers, and that the court so far refused the latter part

of their prayer, that it declined to appoint new receivers. It is not easy to perceive any substantial difference between the two cases. In both the mortgagees availed themselves of proceedings already commenced to obtain a foreclosure of their mortgages. In our case the old receivers became practically the receivers of the mortgagees after the latter had filed their cross-bill.

In the *Kneeland* case, this court held that the receivers were liable for rental; that from and after the time the mortgagees filed their cross-bill, such rental was to be paid in preference to the mortgage debt; but that during the time the receivers held only under the appointment made at the instance of the judgment creditor, such rental was not a debt to be paid in preference to the mortgage debt. The reasons for this latter conclusion were that the judgment creditor instituted the proceedings only for the purpose of *reaching the surplus earnings* for the satisfaction of his debt, and that no one, least of all the mortgagees, was asking the court to take charge of the entire property; *also that the court did not order the receivers to rent the rolling stock in question until after the mortgagees came in with their cross-bill.*

This marks an important distinction between the *Kneeland* case and the one at bar. Not until the mortgagees came in asking for a foreclosure and the appointment of receivers to take charge of the entire property, did that case become similar to the one now before the court. In our case the receivers were at the very inception appointed to take charge of the entire property, not for the purpose of sequestrating the surplus income, but for the purpose of selling the whole. (Record, p. 232.) The mortgagees not only assented to their appointment and to their taking possession of the whole property, but in less than two weeks the trustees in the general mortgage came in with their prayer for a foreclosure and themselves asked that

the receivers should take charge of the property as a whole. Our case was, therefore, from its inception, of the same character as the *Kneeland* case became after the cross-bill was filed by the mortgagees.

That part of the opinion of this court which covers the time after the cross-bill was filed by the mortgagees, must, therefore, govern the decision of this case. The court, speaking through Mr. Justice Brewer, says:—

"On the 1st of December, 1883, however, the situation was changed. At that time the mortgagees upon the realty commenced suits to foreclose their mortgages, and at their instance a receiver was appointed for all the property, both real and personal. In respect to the question here involved, the case is as though this was the commencement of judicial proceedings; and in that respect the attitude is this: The railroad company owned real and personal property, each subject to a separate lien. The holder of the lien upon the realty commences suit to foreclose its lien, and asks the court to take possession through its receiver, of both the real and personal property. In the latter it had a remote interest, though subordinate to existing liens. The court responding to its demands, takes possession of all the property, real and personal. Now, when the holder of a first lien upon the realty alone asks the court of chancery to take possession not only of the real but also of the personal property used for the benefit of the real, that application is a consent on its part that the rental value of the personalty thus taken possession of and operated for the benefit of the realty shall be paid in preference to its own claim. The proposition is a simple one. The application may not be a consent that the contract price of the personalty shall be paid in preference to his lien, but it certainly is a consent that the rental value of that personalty, during the time of the possession by the receiver appointed at his instance, may have priority to his claim. If the holder of a lien upon the realty does not think that the continued possession of the personalty is a benefit to his lien, he should simply omit the personalty from his bill, and ask the court to take possession of the realty alone. But either because he believed that the possession of the

personalty was necessary for the operation of the railroad and the security of his claim; or else because, by virtue of his secondary right he expected to pay for the personalty and retain both the personalty and the realty,—he has had the court take possession of both by its receiver; and by that act, although subsequently the personalty was returned to the holder of the lien upon it, he consented to the payment of reasonable rental pending the receiver's possession. The conclusion is irresistible that under the circumstances reasonable rental value was properly allowed as a prior claim to the mortgage indebtedness. * * *

The initiative in the matter was taken by the trustees. They asked by their bill that the court take possession of all the personalty. If more than was needed, it was their mistake. The court is not to be assumed to be an experienced railroad manager, knowing exactly the amount of rolling stock needed for the operation of the road. It may justly assume that what had been contracted for was necessary, and if the trustees ask that all may be taken possession of, it may act upon that as a declaration that all is necessary, and that rental value is to be paid for all. Theirs is the inquiry and not the court's. It is a mistake to suppose that their duties in respect to the foreclosure proceedings are formal merely, or limited to the employment of counsel and the handling of securities. They assume all the obligations of a party to the suit. They are charged with the care of the entire mortgage interest. They ask and receive large allowances for caring for that interest; and it is a part of their duty to make examination and become fully informed in respect to the property, its liens, what is needed for its operation, and what can prudently and safely be dispensed with. Upon such information, their application should be based. * * * And the taking possession of all the property they name is in reliance upon their representation that all is needed for the operation of the railroad and that they consent either to the payment of the unpaid purchase price of any property thus taken possession of, or a reasonable rental for the use of the same. * * * Can it be held that such possession, taken at the instance of the trustee, casts no burden on the

road, either for the purchase price or rental prior to the claim of the original mortgage? Can the trustee forcibly, through the power of the court, compel an appropriation of this rolling stock for the benefit of the property subject to its lien without compensation? Does not its application for possession carry with it an assent that rental for such rolling stock shall be first paid, as one of the expenses of the receivership which it has invoked? But one answer can be made to this inquiry, and that is that its application is a consent to the payment of reasonable rental during the possession of the receiver — a rental not based upon the use actually made by the receiver, but on the ordinary value of the rental of such property. * * * Such value is not to be determined by the amount of actual use, but by what, in the first instance and before the use had been had, would be adjudged a reasonable rental value."

Kneeland v. *Am. Loan & Trust Co.*, 136 U. S. 100; L. Ed. Bk. 34, p. 384; 43 A. & E. R. Cas. 528.

That part of the above quotation which speaks of a "reasonable rental value," has no application to the case at bar. In the *Kneeland* case, that which was called "rental" was simply an annual installment on the purchase money which bore no relation to the actual rental value of the rolling stock. The case is, therefore, not an authority for holding that we are entitled here to recover only on a *quantum meruit*. It may be said, however, in passing, that there is not the slightest evidence in this record tending to show that thirty per cent. of the gross earnings is not a reasonable rental of railroad property. This point we shall discuss later.

The decisions of the Court of Appeals of New York are in harmony with those above cited. That court says:

"The jurisdiction of a court of equity having possession, in a foreclosure action, through its receiver, of the property of a railroad company, to authorize the creation of debts for rolling stock and other purposes, when in its opinion it is necessary so to do to secure the continued successful operation of the road, and to charge the debts so created as a

first lien on the mortgaged property, has of late years been the subject of consideration by the courts, and the doctrine that this jurisdiction appertains to the power of the court to appoint receivers, is now firmly established."

Vilas v. *Page*, 106 N. Y. 451–2.

In the above case the purchase of rolling stock was made between the foreclosure sale and the confirmation of it, and was upheld as a prior lien.

The only ground upon which full payment can be denied to a party dealing with receivers is that mentioned in the following extract from the opinion of Mr. Justice Brewer in the *Kneeland* case, referred to above. He says:

"No one is bound to sell to a railroad company, or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens." (136 U. S. 98.)

The converse of this must be equally true. Where one is bound to sell to the receivers of a railroad company, or to work for them, where one is powerless to object to the act of the court or its receivers in taking possession of its property, its rights should be held superior to those of the mortgagees. And this is eminently true where, as in our case, at the inception of the lease the rights of the mortgagee had not attached. We repeat what we have heretofore said. In this matter of the operation of our road by the receivers, we had no option. They had the legal right to take possession of our property and operate it, and appellant had no power to prevent it. Our original lessee has always been solvent, and the contract out of which arose our right to payment of rent from our lessee was prior to the placing of any mortgage which affected our road. Under the law quoted above from the *Kneeland* case, we cannot see any escape from the conclusion that

our rent should be paid in preference to any mortgage debt.

(*e*) One or two other points discussed by the circuit judge demand notice. He remarks (Record, p. 214):

"This receivership was upon the application of the mortgagor, a party in possession of various properties, some owned, some leased, and all subject to various obligations. Could the action of the mortgagor or the decision of the court upon his application change the relative rights of the mortgagee and the lessor? Was it in the power of the court upon the application of the mortgagor alone to charge the mortgagee with obligations to which he never assented?"

It occurs to us that in putting these questions certain very important facts have been overlooked. We respectfully insist that whatever was the status of appellant after the date of the appointment of the receivers, it was well known and expressly assented to by the only mortgagees which had any lien on our property. Before the bill was filed, the trustees in the general mortgage had notice that it was to be filed and had received a copy of it. If those trustees were unwilling that receivers should be appointed under the prayer of that bill (Record, p. 236), and for the purposes therein expressed, they had the opportunity at once to make known their objection. They failed to do so. They not only failed to interpose any objection, but immediately thereafter came in with their own cross-bill and asked the specific relief of foreclosure, and on their own behalf urged the appointment of receivers. In view of these facts can it be said that we are attempting to "charge the mortgagee with obligations to which he never assented?"

But the assent of these trustees was manifested even more unequivocally. By a formal and solemn pleading filed in the intervention proceeding of appellant, they admitted that

the receivers had adopted the lease, and their answer does not contain an intimation that such adoption was otherwise than right and proper. (Record, p. 33.)

The assent of the Iron Mountain Company, the only other mortgagee with which we are concerned, is equally explicit. Two days after the order was entered appointing the recivers, they came into court and expressly consented to that order. (See Supplemental Record.)

This court has uniformly held that where trustees are made parties to the suit they thereby have due notice of all applications and orders made in the progress of the case; and that "the bondholders are represented by their trustees and must be regarded as bound by their acts, so far as concerns the power of the court to act in making the orders, and so far as the interests of third persons acting on the faith of it, might be affected." *Wallace* v. *Loomis*, 97 U. S. 146, 163; see also the *Kneeland* case, *supra*.

In view of the fact that the decree of sale, as well as the order confirming the sale, expressly makes the property purchased subject to our claim, if it is held to be a valid one, it becomes important to notice that the purchasers at foreclosure sale are likewise parties to this proceeding, and are subject to the jurisdiction of the court. (*Kneeland* v. *Am. L. & T. Co.*, 136 U. S. 89.)

In *Miltenberger* v. *Railroad Company* (106 U. S. 286), the bill was filed by second mortgagees, and receivers were appointed without prior notification to the first mortgagees. The trustee in the first mortgage was, however, made a party, and afterwards came in and filed an answer and a cross-bill. Later, the bondholders under the first mortgage, came in and filed a cross-bill. The receiver, during all the time that he was in possession of the property, operated the Evansville & Crawfordsville Railroad, under a lease of that road to the mortgagor. The first mortgage bondholders objected to various expenditures of the receiv-

er, and, among others, to the rental paid to the Evansville railroad. This court held that the expenses of the receiver when proper, were to be paid in preference to any mortgage debt, and that the rent to the Evansville & Crawfordsville Railroad was a proper expenditure. As to this rental, the court, speaking through Mr. Justice Blatchford, says:—

"We see no valid objection to this allowance. It is on the basis, not of the lease, but of the actual value of the use of property used by the receivers, with the clear assent, under the circumstances, of all parties interested, which use the first mortgage bondholders and their trustee, chargeable with full knowledge, never sought to prevent; such use being founded on the lease, which was property in the hands of the mortgagor. The line was used for the benefit of the mortgagor's road and of the holders of the bonds under the mortgages, with their acquiescence. Whatever the court would have done, as an original question, if called on to determine whether the receiver should use and run the Evansville road, these appellants must now be held, in view of all the facts, to have consented to treat the right to run that road and take its income as if that right were a part of the mortgaged property and subject to the same rules as the other mortgaged property." (pp. 313, 314.)

And in that case the rental was allowed as a preferential debt to be paid out of the corpus, if the income was insufficient.

Referring again to the above portion of the circuit judge's opinion, we are unable to perceive that "the relative rights of the mortgagee and the lessor" were, as a matter of fact, changed in any respect. While the Wabash Company was a going concern, the mortgagee had no right to interfere with the use by that company of its income or property for the payment of the rents. After the property went into the hands of the receivers, the mortgagee was equally precluded from objecting to the use of the income or property by them to pay rentals accruing on leases adopted by them. The relative status of lessor and mortgagee was the same after the receivership as before.

(*f*) In continuation of his opinion, the circuit judge says (pages 214–215) that where there are claims by two creditors, one secured and the other unsecured, there is no rule of equity by which the rights of the secured creditor can be postponed to those of the unsecured creditor. But we respectfully ask in what sense was the appellant an unsecured creditor? Of whom was it an unsecured creditor? Not of the Wabash Company, surely. For, as we have repeatedly stated, the Wabash Company had paid us in full up to the end of the half-year preceding the appointment of the receivers. When appellant became a creditor it was a creditor not of the Wabash Company, but of the receivers. The mortgagee was not a creditor of the receivers.

The real question then is: Shall a creditor of the receivers, though unsecured, if you please, be preferred to a secured creditor of the Wabash Company? It seems to us that the statement of the question is its sufficient answer. The receivers are bound to pay their own debts before the creditors of the Wabash Company, secured or unsecured, have any claim on the funds.

On page 216 the circuit judge says there "certainly was nothing in the action of the court or the various orders made by it which gave to any party the right to expect other than his legal claims." This we do not deny. What we do insist on is that the court plainly told us that all our legal claims should be paid; and that we were fully warranted, both by the orders of the court and the acts of the receivers, in expecting that all our legal claims would be paid. We have a "legal claim" to the rent accruing on our lease after the receivers became assignees of it. This legal claim is all we are seeking to enforce.

2. Opinion of District Judge.

(*a*) The District Judge in his concurring opinion, which

will be found on pages 218–221 of the record, advances some additional reasons for denying appellant's demand. He says (p. 219):—

"The receivership was not created for the benefit or protection of any one interest or class of interests, but for the benefit of all parties to the suit who were in any wise interested in the system. The lessor companies whose roads went into the possession of the receivers were advised of such facts by the form of the bill and by the prayer for relief."

We respectfully ask what clause in the bill even indirectly indicates that its object was to protect the rights or interests of any of the lessors? The rights of creditors are repeatedly mentioned. But we find no mention of or reference to the rights of the lessors. The references to leaseholds are all such as to show that it was the interest of the complainant and its creditors which it was intended to protect, and not the interests of the lessors. Thus, on page 230, it is stated that unless provision is made for the payment of the rentals, the orator's lease-hold interests *will be forfeited and lost*. On page 231 the fear is expressed that orator's lines will be broken into fragments *and the unity of its system destroyed*. But this is deprecated, not because the lessors will suffer thereby, but because such destruction of the system would prevent the realization of a revenue from these lines and because *the interests of orator and of its creditors and bondholders* would be thereby greatly imperiled. And on the same page the complainant asserts its belief that it was bound to protect said property and to treat the same as a trust fund for the security, *first*, of its *creditors*, and then of *orator's stockholders*. (No anxiety expressed as to the interests of lessors.)

On page 235 the complainant expresses its opinion that it is important that the operation of its lines should not be interrupted; but important to whom? To "*your orator*

and its creditors." And the bill concludes (p. 236) with a prayer that such order be made in the premises "as will insure the protection of the interests of *orator and its creditors*,"— and let all others be heard afterwards.

That the interests of the lessors was the last thing which complainant had in mind, is further manifest from the paragraph in the middle of page 233.

"Orator also prays that such orders be made as would enable such receivers to raise money with which to pay all rentals accrued or accruing, the payment of which are necessary *to prevent the forfeiture of orator's valuable leasehold interests*, and thus prevent the breaking up of orator's lines."

We insist that by the terms of the bill and the prayer for relief, the sole matter as to which the lessors were advised was, that complainant desired to hold their respective roads, and to this end desired that the rentals should be paid; and that this is the only reasonable interpretation to be placed upon it. On page 233, we find this prayer:—

"That your Honors will order and direct that said receivers, after paying the current expenses of operating and maintaining said railroads, and also paying for all labor, supplies, *rentals* and services aforesaid * * * apply the residue * * * to the discharge of all debts, obligations and liabilities of orator."

If this is not a prayer that the rentals he made a "preferential debt," it would be difficult to conceive of language in which such a prayer could be framed. A lessor could put no interpretation on it other than that. It was so understood by the court below. For forthwith an order was entered that "out of the income, *or otherwise*, all rentals accrued, or which may hereafter accrue upon all leased lines," be paid. (Record, p. 239, 240.) When appellant read this language, as well that of the prayer as of the resulting order, was it not warranted in assuming that its rentals would be paid by the receivers? And was not that

the fact of which it was "advised by the form of the bill and the prayer for relief?"

There is a sense, it is true, in which the receivers were appointed for the benefit of all parties, and not for that of the mortgagees alone. But this case does not by reason of that fact differ from other cases in which receivers are appointed. We understand the rule to be that receivers never are appointed in the interests of any particular party. Even where a mortgagee or a judgment creditor moves for the appointment of receivers to protect and manage the property in order that his debt may be secured, the receiver, nevertheless, represents all parties in interest, and holds the property for the benefit of the party who shall ultimately appear to be entitled to it. High states the doctrine in these words:

"The receiver being appointed for the benefit, not of the plaintiff alone, but of all parties in interest, and being an officer of the court, he is liable, etc."

High on Receivers, Sec. 270.

And the estate which he administers is liable on any covenant or agreement entered into by him. (Section 272.) When he adopts an agreement made by the party whose estate he is administering, as a lease, for example, the estate is liable on the agreement. (Sec. 273.) Whether or not he is an assignee, in the strict sense of that term, his act in adopting a lease held by the party whose estate he is administering, makes him liable on the same principle and to the same extent that an asignee of a lease is liable. (Sec. 273)

A recent text-book contains this language: —

"He is not the representative of a party or parties, but the representative of the court. Through and by him the court itself acts, exercising its authority for the corporation, its creditors and its stockholders."

Gluck & Becker, Rec. of Corp., Sec. 1.

So when a receiver is appointed to take charge of property which is in litigation, he holds it for the benefit of the party who may show himself ultimately entitled to it.

"The general duty of a receiver may be said to be to take possession of the estate and premises, or any other property, the subject-matter of dispute in the case, in the room or place of the owner thereof; and, under the sanction of the court, when necessary, to do all such acts of ownership, as the receipt of rents, compelling payment of them, management and letting the lands and houses, and otherwise making the property as productive *for the parties ultimately declared to be entitled thereto* as the owner could do if in possession."

Kerr on Receivers, p. 182.

That the receivers hold the property for the benefit of all parties in interest, the corporation itself, its creditors and those having contractual relations with it, is also held in

Ellis v. *Railroad Co.*, 107 Mass. 1, 17, 30.

Gl. & Beck. Receivers of Corp., p. 144.

Says Mr. Justice Brewer in the *Kneeland* case: —

"A court which appoints a receiver acquires by virtue of that appointment certain rights, and assumes certain obligations, and the expenses which the court creates in discharge of those obligations are burdens necessarily on the property taken possession of, *and this irrespective of the question who may be the ultimate owner, or who may have the preferred lien, or who may invoke the receivership.*"

Kneeland v. *Amer. Loan & Trust Co.*, 136 U. S. 98; L. Ed. Book 34, p. 383; 43 A. & E. R. Cas. 527.

It is evident, therefore, that the fact that the receivers hold for the benefit of all persons in interest, cannot change the status or prejudice the rights of any one, even though he may be also a party to the suit. Much less where he is not a party, or at most only a nominal party.

(*b*) In the paragraph from which we have quoted above (p. 219), the district judge continues;

"They (the lessors) were at liberty at any time after it (the bill) was filed to show, that the extension of the receivership over the leased lines was not necessary to the protection of the interests of the lessor companies, or that it was detrimental to such interests."

What occasion had the lessor to make such showing? We had been told as plainly as language could convey the information that our road would be operated by the receivers and our rents paid by them. There was nothing detrimental to our interests in this. The "detriment" we experienced was that the receivers disregarded the order to pay our rent.

The judge concludes the paragraph as follows: —

"If such showing had been made (and it appears to me that the lessor companies were cited into court to confess or deny the averments of the bill in that behalf) the leased lines would unquestionably have been released at any stage of the proceeding." (Record, p. 219.)

It might be pertinent to ask what averments of the bill we were called on to confess or deny. We were not disposed to deny that our leasehold was valuable to the system; nor that it was for the interest of creditors, secured and unsecured, that the system should be kept intact. We admitted the justice of the order that the receivers should pay the rent to become due us. If the prayer and the order were complied with, we were content.

But we trust that we shall not be deemed guilty of disrespect to the court below when we say that the last clause of the paragraph we have just quoted savors a little of an *ex post facto* condemnation. We are told that we could have had our property if we had wanted it, and that as we did not see fit to take it at once, we must bear the consequences. Yet the record conclusively establishes that the very purpose of the suit in which the receivers were appointed was to prevent us from getting possession of our road, and that no intimation was given us prior to April,

1885, either that we would lose our rental if we failed to re-enter on our property, or that our property would be surrendered to us if we asked for it. It strikes us that the intimation contained in the order of that date, that any lessor "might assert his rights," and that his right to insist upon possession "will be promptly recognized" (Record, p. 270), should not be held to convey information that if we had applied in May, 1884, for a surrender of our road, such request would have been granted.

(*c.*) In view of the emphasis given to this order of April, 1885, it is proper in this connection to review the circumstances leading to its promulgation, leaving the question of its effect for later consideration.

It appears from the record that the first step in this matter was taken in March, 1885, when counsel for the receivers appeared in court and proposed to cancel various leases, among them that of appellant. The conversation which then took place between counsel and the court conclusively shows that up to that time it was the accepted theory of all parties that the receivers had adopted the leases. The whole proceeding which resulted in the order now under review is based upon that idea. The receivers had adopted the leases, had assumed the payment of the rentals, and now the question was how to get rid of them. Speaking of appellant's lease, Treat, D. J., says (Record, p. 261):

"Now you wish to *cancel* the lease, do you, or hold the party *under the lease* and not comply with its terms?"

To which Mr. Blodgett, counsel for the receivers, replied:—

"This lease don't pay; and if the receivers were called on for an expression of opinion, I think they would advise that it would be wiser to *cancel the lease*."

But the court, recognizing the fact that the obligation of a valid, legal contract could not be so easily thrown off by

a dissatisfied party to it, replies, speaking through the district judge:

"It is not advantageous to you, possibly, or to the holders of this general mortgage, that you do go on with it; *but what are we to do with the rights of these parties?* * * The lessor may come in and say, I wish you to *continue to do* what you contracted to do for my line and operate that road. You say you can not do it. Well, what will the lessor do,— *hold you to your contract or what?*"

Mr. Blodgett: "That is the matter that concerns us."

Treat, J.: "And it concerns the lessor equally." (Record, p. 262.)

On a subsequent page (264) the circuit judge, speaking of the proposition to cancel the lease, says:—

"Of course it involves two questions. *First*, whether the lease itself was a valid obligation and a charge upon the road prior to the mortgage; and if so, *second*, whether the lease proving valueless to the Wabash road, the lessor and the lessee can adjust and compromise *by a surrender of the lease upon satisfactory terms.*

Now, the receivers either repudiated or adopted the lease. If they had repudiated it, no question of a surrender could arise. It logically follows that they adopted it.

The learned judge further states in unmistakable language that the mere fact that the lease might be valueless would not warrant the court in cancelling it after it had once been adopted. "I do not think," he says, "that the court can say, we will cancel this lease because it is not profitable. A man has to stand many a contract he makes which is not profitable to himself. * * * We have no omnipotent parliamentary power in this matter that we can set aside anything which is not profitable to the Wabash." (Record, p. 263.)

So, too, both the judges who composed the court at that time recognized that the mortgagees had an interest in this road and that their consent was essential to a cancellation

of the lease, even if the receivers and the lessor should agree upon it. Says the District Judge:—

"Then, again, as already suggested by Judge Brewer, the general mortgage creditors may say, we do not wish to lose this leased road, and we are willing to stand the expense ourselves." (Record, p. 265.)

And on the same page the circuit judge adds:—

"The Wabash Company itself, represented by the receivers, of course is interested, because while to-day the operating expenses of that branch may be in excess of the receipts, to-morrow they may be the reverse. No order should be made without the consent or without the presence of the Wabash road itself, the lessee, in the court responding to that inquiry. The mortgagee under the general mortgage, the Central Trust Company, should be here responding to the inquiry, because as a mortgagee, it has a lien upon this branch, with all the possibility of earnings, whatever that may be." (*Ibid.*)

These extracts from the record establish the fact that whatever may be the effect of the order of April, 1885, upon appellant's right to subsequently accruing rent, that order precludes all parties to this proceeding from denying that the receivers adopted our lease. We will discuss the effect of this order as to subsequently accruing rent under a subsequent head of this argument.

(*d*) We have already adverted to the fact that one ground urged by counsel for appellees in the court below for rejecting the claim of appellant was that the latter was a party to the suit. This point seems to have had some weight also with the district judge, though his view of it differs somewhat from that taken by counsel. On page 219 of the record Judge Thayer says:

"Attention has also been called to the fact that the bill in this case was filed by the mortgagor against all persons and corporations, including the lessors, who were interested in the various roads forming complainant's railroad system.

While again expressing profound respect for the court, whose opinion we are discussing, we must say that it appears to us entirely aside from the question, whether or not the court regarded the receivership as having been created for the benefit of one class or another. The question, as it seems to us, is purely one of legal rights growing out of the course taken by the receivers. It is admitted more than once by both the judges composing the court below that where receivers do adopt a lease they then become by operation of law absolutely bound by the covenants of the lease. Now, we cannot see how the legal consequences of these acts can be averted, or their character changed, by any intention on the part of the court, one way or the other.

I do not wish to be understood as admitting that any order was ever brought to the knowledge of appellant which could be construed into an avowal, explicit or otherwise, that the court did not regard the rentals as an expense of administration. In the first place, we insist that even had appellant been properly and legally a party to the action, any order made as to some other defendant than ourselves, as to which we had no notice and on which we had no opportunity to be heard, would not be binding upon us. It is not enough that it be shown that an order made at some time, and with reference to some line, contained such an avowal. It must be shown that it was so made as to be specifically binding upon this appellant.

The court below places itself on record as holding this view. It expressly stated that it did not consider the lessors parties in any such sense that they were bound to take notice of the orders made in the case. In the proceedings preliminary to the order of April 16, 1885, Judge Brewer says that while in a certain general sense the branch roads and the parties interested are all parties to the proceedings

in this court as to the ordinary operations of the road, yet when any question is raised specifically affecting any leased line, it will be necessary to specially cite such line to appear and to give it an opportunity to be heard. (Record p. 263.) To this Judge Treat assented. Consequently, even if appellant had legally been made a party defendant to the bill by the Wabash Company, it would not have been bound to take cognizance of any proceeding in the case except where special notice had been served upon it and opportunity given it to be heard in that particular matter.

Now, the record before this court will be searched in vain for any order or ruling of the court below prior to April, 1885, which is susceptible of the construction that the earnings of the different lines were to be separately kept. In making this statement, we do not overlook the following clause of the order appointing the receivers:—

"That such receivers keep accounts as may be necessary to show the sources from which all such income and revenues shall be derived, with reference to the interest of all parties herein, and the expenditures by them made." (Record, p. 240.)

If it was intended by this clause to require the receivers to keep the accounts of each leased line and of each component part of the system separately, and to keep a separate account of the expenditures of each portion of the system, it was most unfortunately worded. We submit that such interpretation would not naturally be placed upon it. It would strike the average mind as simply meaning that the receivers were to so keep their accounts as to be able to state what portion of the income and revenue came from freight traffic, what from passenger traffic and what from other sources; and as to the expenditures they should be able to state how much was for maintenance of way, how much for transportation, how much for salaries and various

other classes of expenses. And it was so understood by appellant.

(*f*) Judge Thayer says (Record, p. 220): "The case, as I conceive, bears some analogy to the case of *Bridgewater Engineering Company* (12 Ch. Div., 181)."

The facts of that case were substantially these: The liquidator had expressly informed the landlord that he did not intend to occupy the premises so as to render the assets of the company liable for rent. When the time came at which he was to sell the plant situated on the premises, he notified the landlord of that fact, and suggested that the latter might wish to dispose of his lease at the same time, and that he might desire that the advertisement should state his willingness to grant a fresh lease to the purchaser. This met the view of the landlord, and the advertisement accordingly contained such notice. In the language of the Vice Chancellor, "the landlord was desirous that the plant and leasehold should be sold in one lot and to grant a new lease to the purchaser."

It was under this state of facts that the Vice Chancellor found that it was "a case of mixed accommodations to the landlord and tenant;" and it was this fact which caused the doubt in his mind whether the landlord was entitled to his rent. That his mind was by no means clear on the point appears from the fact that though he dismissed the landlord's motion for rent, he refused costs to the liquidator.

It is not easy to trace the resemblance between this case of the *Bridgewater Company* and the one at bar. In our case appellant was neither consulted, nor was it notified that the receivers would not adopt the lease and would not pay the rent. On the contrary, it was distinctly informed by the bills and cross-bills and by the order of the court below that the system was to be kept together; that the rentals would be paid; and that the paramount object in

view was to foreclose the entire Wabash property as one unbroken system.

(*g.*) While we have felt constrained to point out that the district judge was under a misapprehension as to some of the facts, and to question his interpretation of the allegations contained in the bill, we take pleasure in remarking that we are entirely in accord with him in his statement of the legal principle which governs the case at bar. On page 221 of the record he states it as follows:

"If the court ordered them to take possession of the same (that is, the leased lines) for the benefit of any particular interest or class of interests involved, and without any reference to the protection of the rights of the lessor companies themselves, then those interests for whose advantage the leased lines were taken and operated by the receivers should stand the expense of the rental and the court would be bound to so order. *The court has no more right than an individual to use one person's property for the exclusive benefit of another without paying for its use.*"

Inasmuch as the court did take possession of the leased lines without any intention, expressed or understood, to protect the interests of the lessors themselves, but solely for the benefit of the creditors of the Wabash Company; inasmuch as appellant was not a creditor of the Wabash Company, and was not one of those for whose interests the receivers were ordered to operate the line, it follows that those for whose advantage the leased lines were taken and operated, viz.: the creditors, secured and unsecured, should stand the expense of the rental. This is all we have ever claimed; but we have always claimed, and do here most strenuously urge, that our rent should be paid before one dollar goes to the benefit of any party who was a creditor of the Wabash Company when the receivers were appointed. We insist that the court below should have acted upon the principle announced by the district judge that it had "no

more right than an individual to use one person's property for the exclusive benefit of another without paying for its use." We also insist that the court should have acted on the view stated by the same judge on a previous page, where he declares that "it is also well settled that if mortgagees in a proceeding to foreclose a mortgage procure the appointment of receivers and cause them to take possession of property held in lease by the mortgagor, to which their mortgage does not extend, they thereby bind the mortgaged property for the payment of rent so long as the receiver remains in possession." (Record, p. 218.)

Can it make any difference whether the mortgagee itself initiates the proceeding, or approves of it and takes the benefit of it when initiated by some one else? Especially when one mortgagee has by a record entry assented to the order appointing the receivers and defining their duties, and the other mortgage has by a formal pleading admitted that the receivers had adopted the lease, without suggesting that such act was improper or improvident? And is not the case still stronger against the mortgagee if his mortgage does "extend" to the leasehold, than if it did not?

V. *Effect of the order of April, 1885.*

In the course of this argument, the order made by the court on April 16, 1885, has been frequently mentioned. It remains to discuss the effect of that order upon the question involved in this appeal. It was strenuously urged below by counsel for the receivers that, whatever appellant's rights might be as to rent accrued prior to the entry of that order, it had no ground to expect that subsequently accruing rent would be paid. And they point to the third paragraph of the order, which reads as follows:

"Where a subdivision earns no surplus, no rent or subdivisional interest will be paid." (Record, p. 270.)

We respectfully insist that this order cannot be held to change or prejudicially affect our then existing status. The liability on the part of the receivers grows out of the adoption by them of the lease. They stood, after they had taken possession of our property and commenced to operate it, in the same position as any assignee of a lease. The law cast upon them the same responsibility that had previously rested upon the lessee, and they became liable by privity of estate to perform all the covenants to which the lessee had been bound. There was only one way by which they could rid themselves of their liability, and that was by assigning over. A sale under decree of foreclosure and a deed to the purchasers would have had that effect. So, we suppose, would an order by the court to return the property to the original lessee. But nothing short of an assignment of some kind, accompanied by delivery of possession, would have put an end to the liability which rested upon them by virtue of the privity of estate between them and appellant. This is so elementary a principle in the law pertaining to the assignment of leases, it is not necessary to cite authorities in support of it. What the receivers could not do, the court could not do, since the receivers were in fact only the arm of the court. Their position was the court's position. The obligation which devolved upon them as assignees of the lease, was in fact an obligation which devolved upon the court. A statement, therefore, by the court, that it would not continue to be liable as assignee of the lease would have no more force than a statement to that effect by the receivers.

As we have stated, in the beginning appellant's position was a purely passive one. It had no right to act; it had no right to object to any action. But when the lease was once adopted, then the rights of appellant became fixed,

and neither the court nor the receivers had any power to alter those rights.

We are by no means willing to admit that our lease was a disadvantageous one or that the operation of our road was a burden to the system as a whole, But if such fact were admitted, or were proved beyoud a doubt, its legal effect would not be to confer upon the court a right to repudiate the lease which it had adopted. If such were the result, if it be the rule that a receiver may repudiate a lease after adopting it, because he finds it to be less advantageous than he had anticipated, we should expect a clear annunciation of the doctrine in some adjudicated cases. We venture to say that neither in England nor America can any case be found in which such a rule has been directly declared. One of the earliest cases involving the question is *Turner* v. *Richardson* (7 East. 335), which holds that the lease cannot be requdiated. Says the court of King's Bench in that case:

"If they made their election to take the lease they can not afterwards renounce it because it turns out to be a bad bargain."

Lord Elenborough held in *Hanson* v. *Stevenson* (1 B. & A. 303) that assignees must make their election promptly, and having once made it, *they must abide by their decision.*

In *Dorrance* v. *Jones* (27 Ala., 633) it is said that "when once the election was made, *the assignee could not recede from it.*"

In other cases the rule is declared to be that if a receiver or assignee elects to take the term, he takes it *cum onere.*

Dixon v. *Smith*, I Swanst., 457;

Martin v. *Black*, 9 Paige, 641.

It was urged in the argument below that the *Woodruff* case (93 N. Y. 609) was an authority to the effect that the court could at any time order the receiver to surrender the lease, even though he formally adopted it. But that por-

tion of the opinion which touches this question is purely *obiter*. The case involved no question of surrender. The *dictum* is at variance with all the authorities, whether text-writers or courts.

The case of *New Jersey & New York Railway Company* (29 N. J. Eq., 67) is not in point. There both companies were insolvent, both were in the hands of receivers and both receivers had been appointed by the court which was called upon to determine the question at issue between them. The court rests its decision upon this ground—that it was sitting as a court of equity, administering two trusts; that the question was one to be decided on equitable grounds; that it would determine the matter so that neither trust should obtain any advantage over the other, and without any regard to the legal rights of either under the contract.

But we are not here asking for the adjustment of equities. Our claim is for our legal rights. It is a claim which, if sued on in any other court than the one which appointed the receivers, would have been triable by a jury. If our claim is denied it will be in violation of the very principle laid down by Chancellor Runyon in the above case. "The court, of course," he says, "*will not take the property of one railroad company for the benefit of another.*" (p. 69.)

The argument on this point has so far proceeded on the theory that the court below attempted to surrender our lease. But this does not accurately state the case. What it, in fact, undertook to do was, without negotiating with us for new terms, to hold on to the property and operate it without paying rent for it. It said to appellant, we will not pay you rent, notwithstanding the contract of the lease. You may take your road if you want it. But though you may be now unprepared to take it; though it may require months before you will be in a condition to take it, never-

theless, our receivers, though they continue to operate it, will pay no compensation. At a time when the law gave us no option, but did give one to the receivers, the latter exercised it by assuming the lease. When they became tired of their bargain, the court said to us, now you shall exercise an option to resume your road, or submit to the alternative of its being operated by the receivers without compensation.

It must be borne in mind that this was said without warning to us. Only a few days' notice was given appellant that the matter was to be considered. The hearing was had on April 13th, and the order made April 16th. (Record, p. 267, 268) For nearly a year prior to that date the receivers had been operating our road, and no intimation had come to us from the court that they would not continue to operate it. It could not be expected that we would be prepared at a moment's notice to take possession. Yet, the court positively declared that it would not pay rent, however long it might continue to operate the road. We confess that we cannot see any theory of law or equity which would justfy the court in withholding rent while it continued to hold possession. Nor do we see how appellant's willingness or ability to resume possession can effect the question.

If it be conceded that a receiver ever has the right to surrender a lease once adopted, the time to have made the surrender was when appellant first filed its intervening petition. By continuing to operate the road after that time they expressed their unequivocal intention not to surrender.

It is plain from the action of the court below that its judges did not entertain the idea that the liability of the receivers was in any manner altered by the order of April, 1885. If they had so construed it they would have directed that our rental should be paid to that date. But the fact is

they denied our claim for rent accruing prior to that order equally with that which accrued afterwards. And they rejected our claim as a whole, on grounds which had nothing to do with the order in question.

In this connection, we again advert to the language of the circuit judge in the discussion which took place when the matter was first called up. He said that one of the questions to be determined was whether "the lessor and the lessee can *adjust and compromise* by a surrender of the lease upon satisfactory terms." (Record, p. 264.) Clearly the learned judge would not have used this language if he supposed the receivers could rid themselves of the obligation of the lease without the consent of the lessor.

There would seem to be another ground upon which it should be held that this order did not affect our right to rents accruing after its date. The order is expressly based upon the theory that each specific portion of an entire system is entitled to the amount payable to it under the contract by which it became a part of the system, only in case such specific portion earns enough to pay such amount. A sufficient answer to this proposition is that it is impossible to tell how much any given portion of a railroad earns in dollars and cents. It might be that in a road a thousand miles long there was a portion covering a half dozen miles which was originally laid over a bog or a quicksand, which by reason of such insecure foundation would cost in repairs many times more than the actual *pro rata* receipts from the number of miles embraced in it. Yet it would be extremely unfair, if that small portion of the road belonged to another company and was held under a lease, that no rental should be paid to it because of the circumstance referred to.

Appellant's condition is quite parallel with the one supposed. The master found that, owing to previous failure

to repair, the receivers were compelled to make large and extraordinary outlays, and that the gross earnings of appellant's road were decreased and diminished by reason of the previous failure to put the road in proper condition. (Record, p. 42.) It appears therefore, that appellant suffered from this failure of its lessee at both ends. The expenditures were much greater, the receipts were much less, than had the road been in good order. Yet the court below held that, inasmuch as by reason of this condition of things the expenditures were in excess of the receipts, we have forfeited all right to the rental provided in the lease.

Nor is it true that any other line or branch, whether it has become a part of the consolidated system by purchase, by lease, or otherwise, has any claim as against this income which is superior to that of appellant. The mere fact that on one part of this vast system the receipts from local traffic, together with the share of through traffic receipts, happen to exceed the amount of money used in operating that particular part of the system, or that expenses happen to be less on some specified number of miles of road in one locality than in another, presents no valid reason why the money earned on such particular section of the line should be used for the exclusive benefit of that section. All receipts became a part of the general income. They all went into the hands of the receivers, and were derived from the operation of the system as a whole. No principle, legal or equitable, will justify their sequestration for the payment in full of certain demands or expenses, while others are left totally unpaid. To quote again from the opinion in *Woodruff* v. *Railway Company* (*ubi supra*):

"It would seem to be entirely immaterial as to the source whence the funds in the hands of the receiver were derived, or whether the particular portion of such road, covered by mortgages, contributed more largely to such fund than

other portions not subject to such liens. Under the orders in question, the receipts, from whatever source derived, were to form one common fund, applicable in the first instance to the discharge of the obligations which the receiver was thereby authorized to incur." (p. 623).

And the Court adds:—

"It seems to us, however, that it does not necessarily follow that the value of any specified portion of an extensive railroad system can be measured with exactness by the amount of the receipts of such particular portion. Its value as a feeder or connecting link in such a system may be largely disproportioned to the actual sum received for transportation over it. Such considerations, *influential as they might be in affecting the action of parties in negotiating a contract for the use of a railroad*, would preclude a court from holding that the actual receipts of a road thus situated, constituted an equitable basis for fixing the compensation to be paid for its use" (p. 624).

It will be borne in mind that appellant's lease is one of the oldest leases in the system; that its line became a part of the Missouri road long before the present consolidated system was constructed; that it antedates the general mortgage and the Iron Mountain mortgage. While the St. Louis, Kansas City and Northern Railway Company was the lessee, appellant had a contract with a solvent party, abundantly able to pay its rent and keep its road in proper condition. That lessee is to-day in a solvent condition, and as the record shows, has always been able to pay its fixed charges, the interest on all its bonds, and our rental. After the consolidation, however, the new system began to add other lines, to acquire other roads by purchase or otherwise, until it became so weakened by its unprofitable branches that insolvency ensued. Why should we be compelled to suffer the consequences of this improvident reaching out and grasping other lines? Why should we be denied the right to our rent because this vast conglomeration of roads has so many weak points that all cannot be paid in full out of the income?

One other point must not be overlooked: the receivers by adopting the lease, became bound by all its covenants. Their obligation to repair was equally binding with that to pay rent. They cannot, therefore, set up their outlay for repairs as a defense to our claim for rent.

VI. Appellant is entitled to the entire amount of rental claimed in the court below.

1. The receivers took possession in the middle of a half year. The rent became due September 1, 1884, March 1, 1885, September 1, 1885, March 1, 1886, and April 24, 1886, the date of the surrender. Thus all these installments accrued while the receivers were in possession. It is unnecessary to cite authorities to show that an assignee of a lease is liable for the rent accruing while he is in possession.

The small balance remaining over from the half-year ending March 1, 1884, is properly a part of the rent accruing due September 1, 1884. This seems to be the only reasonable or practicable construction of the lease [see record, p. 14, 3d paragraph]; and such was the construction put upon it by the parties as manifested by their course of dealing. It should be paid, too, on the principle laid down by Mr. Justice Harlan in *Thomas* v. *Railroad Co.*, 36 A. & E. R. Cas. 393.

2. The rent to which we are entitled is that fixed by the lease, viz.: thirty per cent. of the gross earnings of the road. This necessarily follows from the principles to which I have already adverted. The receivers are holden for rent because they became assignees of the lease. An assignee of a lease, during the time that he holds as such, is liable

on the covenants of the lease to the full extent that the original lessee was holden. To this proposition we cite, in addition to those collated on pages *ante*, the following authorities:—

1 Smith's Lead. Cas. (7th Am. Ed.) 227;
Stewart v. *Railroad Co.*, 102 N. Y. 601;
Smith v. *Brinker*, 17 Mo. 148;
Willi v. *Dryden*, 52 Mo., 319;
Blake v. *Sanderson*, 1 Gray, 323, 325;
Easton v. *H. & T. C. Ry. Co.*, 38 Fed. Rep. 784.

We do not understand that this court has ever made an exception to this rule. There are cases, we admit, in which the court speaks of a fair and reasonable rental being allowed for the use of property operated by receivers. But we know of no direct decision that a lessor, whose lease has been adopted by receivers, is not entitled to the full rent reserved in the lease. There are cases, to which we shall in a moment refer, in which the lessor did receive rent on the bases of a *quantum meruit*. But in none of these cases was it decided that, where receivers take possession of a leasehold, valid as to the party whose estate they are administering, they may escape payment of the full rent reserved by its terms.

If the fact that the value of the leasehold is not equivalant to the reserved rent furnishes a ground for reducing the rent after the leased property passes into the possession of a receiver, the same principle would require that the rent should be increased in case the amount reserved in the lease were less than its reasonable and fair value. Yet we apprehend no court would allow any greater sum than the rent reserved. This shows the fallacy of the argument that the receivers ought to be held only for the actual value of the leasehold to the system.

It is true that in the case of *Miltenberger* v. *Railroad Co.* (106 U. S. 286) the fact is mentioned that the rental

allowed was not based upon the lease, but upon a fair rental value. This cannot be held, however, as committing this court to the rule that rent can only be allowed on a *quantum meruit*, and not on the covenant of the lease. If such were its position, the ruling of this court would be in direct conflict with that of all other courts which have passed on the question. The fact is, in the *Miltenberger* case the trial court, for some reason not disclosed by the record, took that position and the lessor made no complaint. The lessor was not before this court by appeal, being satisfied with the amount allowed.

It must be borne in mind, too, that in our case there was not a particle of evidence produced before the Master that thirty per cent. of the gross earnings would be an excessive rental for our road, as based upon what other roads of the same character would rent for.

It is said in the *Kneeland* case that the rental should not be "based upon the use actually made by the receiver, but on the ordidary value of the rental of such property * * * what in the first instance, and before the use had been had, would be adjudged a reasonable rental value." (136 U. S. 103.) On this basis who can say that thirty per cent. of the earnngs is not a reasonable rental?

But this *Kneeland* case cannot be considered an authority in support of the *quantum meruit* theory. What was there called a rental was in realty only an installment of the purchase money, and its amount bore no relation whatever to the actual rental value of the rolling stock. It became necessary, therefore, to fix a rental value. That is all that this court means in what is said on page 103 of the opinion.

In the case of the *St. Louis, A. & T. H. R. R. Company* v. *C. C. C. & I. Railroad Company* (125 U. S. 658; L. Ed. Book 31, p. 832; 33 A. & E. R. Cas. 16), Mr. Justice Mathews says that the lessor is entitled to a

fair and just compensation for the use of its road upon a *quantum meruit*. But that was because the lease had been declared void. It will, nevertheless, be noticed that the rental was allowed upon the basis of the sum fixed in the lease. That case comes far short of being an authority that a valid lease may be set aside and the recovery of the lessor limited to a *quantum meruit*.

The decision in the *Oak Pits Colliery Company's case* shows that in the opinion of Lord Justice Lindley, the value of the leasehold cannot be considered by way of reduction of the rental, since he held there that the lessor was entitled to the full rent, though he could not have realized so much from a distress. (L. R. 21 Ch. Div. 322.)

RESUME.

To sum up the points made in this argument, we urge

1. That the receivers adopted appellant's lease, and became bound by all its covenants.

2. That the receivers of railroad property stand in no different position, as to their rights, duties and liabilities, and are governed by no different rules from those administering property of any other character.

3. That appellant was not a party to the suit instituted by the Wabash, St. Louis & Pacific Railway Company, and if it had been, such fact would in no way alter or affect the relation in which it stood to the receivers.

4. That the receivership was in no sense for the benefit of appellant, and that its claim for rent is superior to the rights of the mortgagees, not only against the income, but against the corpus.

5. That appellant's right to rent was not altered, or in anyway affected, by the Circuit court's order of April 16, 1885.

6. That appellant is entitled to the full amount of rent covenanted for in the lease, and that the amount due it should not be computed on the basis of a *quantum meruit*.

We respectfully submit that under the decisions of this court, and the settled principles governiug the conduct of receivers appointed to take charge of property pending litigation, the decree of the court below dismissing appellant's intervening petitions should be reversed, and that an order should be entered that the entire sum which has accrued in rent be paid to appellant.

EVERETT W. PATTISON,
In behalf of Appellant.

Supreme Court of the United States

OCTOBER TERM—1891.

TERM No., 223.

THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY AND THEODORE GILMAN AND CHARLES H. BULL, TRUSTEES, APPELLANTS,

vs.

SOLON HUMPHREYS AND THOMAS E. TUTT, RECEIVERS OF THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF OF D. H. CHAMBERLAIN,

FOR APPELLANTS.

Albert B. King, 89 William St., N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1891.

TERM NO. 223.

THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY, and THEODORE GILMAN and CHARLES H. BULL, Trustees,

Appellants,

vs.

SOLON HUMPHREYS and THOMAS E. TUTT, Receivers of THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF FOR APPELLANTS.

Statement.

May 27, 1884, the Wabash, St. Louis and Pacific Railway Company, and all its property of every descrip

tion, was placed in the hands of Receivers—the appellees, Solon Humphreys and Thomas E. Tutt—by an order of the Circuit Judge of the United States Circuit Court for the Eastern District of Missouri (Record, fols. 89–92).

The order appointing the Receivers was made upon the application of the Wabash, St. Louis and Pacific Railway Company, upon a bill filed by the Company itself for that purpose (fols. 67–88).

By an indenture made August 21, 1879, the railroad of the Quincy, Missouri and Pacific Railroad Company, extending westward from West Quincy, Missouri, towards the Missouri river, was leased to the Wabash Railway Company for a period of ninety-nine (99) years, with the option to the lessee to renew the same perpetually (fols. 16–26).

November 10, 1879, the lessee, the Wabash Railway Company, was consolidated with another railroad company in Missouri, the consolidation forming the Wabash, St. Louis and Pacific Railway Company (fol. 27).

On said May 27, 1884—the date of the said appointment of Receivers of the Wabash, St. Louis and Pacific Railway Company—the said Wabash, St. Louis and Pacific Railway Company was in possession of and was operating the railroad of the said Quincy, Missouri and Pacific Railroad under said lease of August 21, 1879 (fol. 28), and on said May 27, 1884, the Receivers aforenamed, Humphreys and Tutt—under the said order of May 27, 1884, took possession of, held and operated the said railroad of the Quincy, Missouri and Pacific Railroad Company until August 1st, 1885 (fol. 28), when it was surrendered, by order of the Court, to Theodore Gilman and Charles H. Bull, trustees, two of the present appellants (fols. 185–190).

By the lease of August 21st, 1879, the lessor company agreed, among other things,

(1.) To guarantee and pay the interest on mortgage bonds of the Quincy, Missouri and Pacific Railway Company, amounting to $1,204,000, at six (6%) per cent. per annum (fols. 4–22).

(2.) To maintain and operate said railroad of the Quincy, Missouri and Pacific Railroad Company, keeping the same in good condition and repair for the full term of the lease (fol. 21).

(3). And to pay all taxes (fol. 21).

On July 1st, 1884, an instalment of interest on the bonds of the Quincy, Missouri and Pacific Railroad Company, amounting to $36,120, became due and was not paid by the Receivers.

On January 1st, 1885, another like instalment, amounting to $36,120, became due and was not paid by the Receivers.

On July 1st, 1885, another like instalment, amounting to $36,120, became due and was not paid by the Receivers (fols. 32, 54).

The rent due for the month of July, 1885, also, amounting to $6,020, was not paid by the Receivers (fols. 5, 32).

The foregoing instalments of rent amount to $114,380.

The taxes on the railroad of the Quincy, Missouri and Pacific Railroad Company for the year 1884, amounting to $16,000, were not paid by the lessee company nor the Receivers, and were paid by the trustees, the appellants (fols. 32, 36).

The lessee company and the Receivers failed to keep the railroad in good condition and repair, as required

by the lease, and such repairs were made by the lessor company or the trustees, at an expense of $15,000 (fol. 32).

On August 1, 1885, by an order of the Court made upon the petition of Theodore Gilman and Charles H. Bull, trustees, the railroad and property of the Quincy, Missouri and Pacific Railroad Company was surrendered by the Receivers to said trustees (fols 185, 190).

June 9th, 1884, the Central Trust Company of New York and James Cheney, trustees of a certain general mortgage of the Wabash, St. Louis and Pacific Railway Company, filed a cross-bill for the foreclosure of said mortgage, whereupon the bill of the Wabash, St. Louis and Pacific Railway Company, under which the Receivers were appointed, entitled "Wabash, St. Louis and Pacific Railway Company, Complainant, *vs.* The Central Trust Company of New York and others, Defendants," was consolidated with said cross-bill of the Central Trust Company and James Cheney, and the consolidated suit was entitled as in the record, "Central Trust Company and others *against* Wabash, St. Louis and Pacific Railway Company and others" (fols. 136, 190).

The consolidated suit proceeded to final decree of foreclosure and sale, January 6, 1886 (fols. 190–258).

April 26, 1886, the property of the Wabash, St. Louis and Pacific Railway Company was sold under said decree (fol. 258).

December 31, 1886, the property in question was directed to be turned over by the Receivers to the purchasers (fol. 260).

December 5, 1885, Gilman and Bull, trustees, filed

their petition in the consolidated suit of "The Central Trust Company of New York *et al. against* The Wabash, St. Louis and Pacific Railway Company *et al.*," setting forth the facts of the lease of the Quincy, Missouri and Pacific Railroad to the Wabash Company; the terms of said lease; the possession and operation of the property leased by the Wabash, St. Louis and Pacific Railway Company, and thereafter by the Receivers, till August 1st, 1885; the default of the Wabash, St. Louis and Pacific Railway Company and of the Receivers in the payment of the rent, in the making of repairs, and in the payment of taxes; and praying an order directing payment by the Receivers of said unpaid rent to the amount of $114,380 (fols. 3, 7).

June 12, 1886, the Quincy, Missouri and Pacific Railroad Company, one of the present appellants, filed a like petition, setting forth the default of the Wabash, St. Louis and Pacific Railway Company and the Receivers in the payment of rent, amounting to $114,380; and in making repairs, amounting to $15,000; and in payment of taxes, amounting to $16,000; and praying an order directing the Receivers to pay the same (fols. 29, 34).

The two foregoing petitions were referred to a Master who reported, recommending that the petitions be denied (fols. 36, 43).

Exceptions were filed to the Master's report, and after argument, the petitions were dismissed by order dated March 19, 1888 (fols. 43, 46).

Opinions were filed by the Circuit Judge, and by the District Judge (fols. 46, 65).

An appeal was allowed to this Court, March 22, 1888 (fol. 66).

Argument.

The foregoing statement of this record presents this case:

The entire property of the Wabash, St. Louis and Pacific Railway Company was, on May 27, 1884, placed by the Court below in the hands of Receivers;

Among the properties of the Wabash, St. Louis and Pacific Railway Company at the time of the appointment of the Receivers was its leasehold interest in the railroad of the Quincy, Missouri and Pacific Railroad Company, including the perpetual right to possess and operate the same;

The Receivers, in point of fact, on May 27, 1884, under the orders of the Court, took possession of the railroad of the Quincy, Missouri and Pacific Railroad Company, and held and operated the same continuously until August 1, 1885;

By the terms of the lease in question, the sum of $114,380 accrued and became payable as rent during the period of the possession and operation of the railroad, and the further sums of $16,000 for taxes, and $15,000 for repairs;

These sums, amounting to $145,380, were claimed by the petitioners below—the appellants here—to be chargeable against the Receivers as part of the obligations incurred by them in operating the railroad of the Wabash, St. Louis and Pacific Railway Company, as Receivers.

It is proposed, in this argument, to consider,

FIRST.—What is the general rule of law which has heretofore been applied in such cases as the present; and

SECOND.—Whether there are any circumstances existing in the present case which except it from the general rule.

I.

The Receivers of the Wabash, St. Louis and Pacific Railway Company, having taken possession of and operated the railroad of the Quincy, Missouri and Pacific Railroad Company, from May 27, 1884, to August 1, 1885, must be held to have adopted the lease under which said railroad was held at the time of their appointment, and to have made themselves and the property in their hands liable to the lessor company according to the terms of such lease.

The rule of law which supports the foregoing proposition is everywhere stated in substantially the same terms:

"As a rule, Receivers are not liable upon the covenants of the persons over whose effects they are appointed, but become liable solely by reason of their own acts. And Receivers who have been appointed over a corporation, and who have accepted the trust and taken possession of the assets, do not thereby become liable for rent of the premises held by the company under a lease.

Nor can they be held liable until they elect to take

possession of the premises, or until the doing of some act which would in law be equivalent to such an election. But when a Receiver enters upon and occupies premises which had been leased to a corporation over which he is appointed, he thereby becomes liable for the rent due under the lease; the liability in such cases being the common law liability of an assignee of a lease, and not for the debt due from the corporation. And in such case, the facts being undisputed, it is proper for the Court to direct the Receiver to make payment to the lessor without a reference to determine the matter."

High on Receivers (2d Ed.), Sec. 273.

"Where the property of which a Receiver is appointed consists of a leasehold interest, the Receiver should make it his first duty to see that the rent thereof is paid; he should not wait for the landlord to take any proceedings to collect, but he may pay it absolutely and without first obtaining leave of the Court. In the event of his failure to do so, he may be required to do it by petition in the cause in which he was appointed, and also upon a like petition he may be required to make good any loss to the lessor arising from the failure of the tenant to keep covenants or agreements to maintain premises in as good condition as he received them."

Beach on Receivers, Sec. 514.

"It is settled that the Receiver may be ordered to pay out of the income and as one of the expenses of operating the road, the rentals due for a line leased by the company, whose property is in his possession, and which he is authorized to operate; and if the Receiver uses such a leased line with the full knowledge and consent of the bondholders, the payment of a fair rental for the use of such line, and also payment for supplies

and materials used in its operation may be enforced out of the proceeds of foreclosure before distribution among the bondholders."

Beach on Receivers, Sec. 372.

"When the assignment is by deed, an assignee becomes liable as such by merely accepting the deed; but if a man becomes assignee only by operation of law, he is not, in general, chargeable until he actually enters, or does some other act showing his acceptance of the lease."

Taylor, Landlord and Tenant, Vol. 2, Sec. 451.
Salmon vs. *Smith*, 1 Saund., 203 b.
Williams vs. *Bosanquet*, 1 Br. & B., 238.

In *Thomas* vs. *Pemberton*, 7 Taunt., 206, it was held that if the assignees of a bankrupt intermeddled with and assumed the management of a leased farm, this was a sufficient election to take the lease and made them liable to the landlord, in consideration of their tenancy, for all mismanagement.

In *Hanson* vs. *Stevenson*, 1 B. & Ald., 303, which was an action for rent brought against assignees in bankruptcy as assignees of the term, Lord Ellenborough said:

"Here it is stated as a fact that they have taken possession, and by that act unexplained they must be considered to have possessed themselves in virtue of the legal right conferred upon them by the assignment for the Commissioners, viz.: as assignees of the term, and then they have made themselves liable for the covenants in the lease. I know of no instance in which a deliberate act of taking possession has been curtailed of its full legal effect."

In *In re Lundy Granite Co.*, 6 Ch. App., 462, the Court said:

"But in some cases between the landlord and the company, if the company for its own purposes and with a view to the realization of the property to better advantage, remains in possession of the estate, which the lessor is, therefore, not able to obtain possession of, common sense and ordinary justice require the Court to see that the landlord receives the full value of the property. He must have the same rights as any other creditor, and if the company choose to keep the estates for their own purposes, they ought to pay the full value to the landlord, as they ought to pay any other person for anything else, and the Court ought to take care that he receives it."

This was a case of winding up under the English statute, but the principle just stated does not seem to have been made to depend at all upon the language of the statute.

In *In re South Kensington Co-operative Stores*, 17 Ch. Div., 161, a company being in liquidation, continued in the use of leasehold premises, and upon a summons for leave to distrain for the rent, *Fry*, J., said:

"It is hardly a controversy between the parties that, roughly speaking, the rent which accrued before the liquidation should be a matter of proof, and the subsequent rent a matter of full payment."

The Court then decreed that rent in full must be paid from the date of the commencement of the liquidation, upon the principles laid down in *In re North Yorkshire Iron Co.*, 7 Ch. Div., 661.

In the last-named case, a company in course of liquidation retained, for the convenience of winding up,

certain leasehold premises, and here it was held that the lessors might distrain for rent accrued after the commencement of the winding up, but that for rent accrued before that time they must prove as other creditors.

In this case there was a proviso in the lease for re-entry, and upon this the Court remarked that, "in exercising the discretion of the Court in present case, seeing that there has not been an offer by the company to surrender, and the company has not desired a determination of the tenancy, but has wished to retain possession and to dispose of the concern as a going concern, I do not think that I should, by reason of the existence of the power of re-entry, refuse the leave to distrain."

In *In re Silkstone & Dodworth Coal and Iron Co.*, 17 Ch. Div., 158, a coal mine having been leased to a company, the lessor gave notice to the liquidator engaged in winding up the company, requiring payment of a half year's rent, or that the working of the mine should be stopped by the liquidator. The liquidator neither paid the rent nor stopped working, and it was held that the liquidator having elected to continue the working, must pay the full rent out of the first assets; and this case was decided upon the authority of *In re Lundy Granite Co.* (*supra*).

In *In re Brown, Bayley & Dixon*, 18 Ch. Div., 649, certain trustees for debenture holders of Brown, Bayley & Dixon, Limited, under a mortgage embracing certain leasehold lands, &c., which mortgage gave a power to the trustees to distrain in respect of interest which should be in arrears for 40 days, as a landlord might distrain in respect of rent, applied to the Court for liberty to exercise the power of distress for the recovery of arrears of interest while liquidators of the company

were in possession of the mortgaged property, including the leasehold interests.

Fry, J., in deciding the case, says:

"A mortgagee and a lessor, although in one sense independent persons, are nevertheless creditors of the company in respect of any amount due on the mortgage or on the lease at the date of the winding up, and, as such creditors, they ought, in my judgment, to have neither preference nor priority. In respect of any rights arising after the winding up, by reason of the company or the liquidators remaining in possession of the demised or of the mortgaged premises, they ought, in my judgment, to be treated as independent persons, and if the company or the liquidator choose to remain in possession of the demised or mortgaged premises, they must so remain upon the terms and conditions of the instruments, just as any other persons must observe those terms."

In *In re Progress Assurance Company*, L. R., 9 Eq., 370, where offices had been let to a company which was ordered to be wound up, and a distress was subsequently applied for by the lessors, it was held that "where, for the purpose of administration, it is desirable to retain possession of the offices, the rent is looked upon as a part of the administration expenses. But here possession was not so retained."

In *In re Bridgewater Engineering Company*, 12 Ch. Div., 181, a company which had leased certain premises went into voluntary liquidation, which was continued under the supervision of the Court. Upon a motion by the landlords for an order on the liquidator to pay the rent which accrued before and after the liquidation, it appeared that certain negotiations had taken place between the landlords and the liquidator, which made it

doubtful whether the leased property had not been retained for the benefit both of the landlords and the tenants, and the Court, upon those facts, concluded thus:

"This was a case of mixed accommodation to the landlords and to the tenants, and I cannot say that because the machinery, plant and chattels were sold upon the premises, the premises were used by the liquidator and were in his sole occupation for the purposes of the liquidation. Therefore the motion will be dismissed, but without costs."

See, also, *Dixon* vs. *Smith*, 1 Swanst., 457.

The foregoing examination of English authorities, both early and late, leaves no doubt of the state of the English law upon the present question. The position of a liquidator under the English Companies Act is legally the same as that of a Receiver at common law, and the process of distraint for rent is the equivalent of our remedy by judgment against the Receivers.

The foregoing cases, therefore, are authority for the conclusions:

First.—That rent accruing after possession is taken of the leased premises by a liquidator or Receiver, or similar officer, is, generally speaking, or perhaps *prima facie*, payable in full out of the assets in the hands of the Receiver, &c.

Second.—That in any given case the test of the liability of the Receivers, &c., is whether the possession of the leased premises has been continued for the benefit or convenience, or other advantage of the insolvent estate; and by this plainly is not meant the ultimate profit or net result of such retention or possession, but the fact that the retention was voluntary and for the purposes of the liquidation, be those purposes what they may.

But the doctrine which we have cited from *High on Receivers*, and other authorities, is equally well sustained by the decision of our own Courts, both State and Federal.

In *Martin* vs. *Black*, 9 Paige, 641, a Receiver had been appointed of the defendant's property upon a judgment creditor's bill, and the defendant afterwards assigned his property to such Receiver; the property of the defendant embraced certain premises, of which the defendant was tenant, and rent thereafter became due, and the Receiver took possession of the furniture of the defendant on the leased premises and removed it. While this furniture was on the carts in the street near the premises, the landlord undertook to distrain for rent, but was prevented by the prior possession of the Receiver. The landlord thereupon presented a petition to the Vice-Chancellor for an order that the Receiver deliver the property under the distress warrant, or that he pay the rent due out of the proceeds of such property.

Much of the difficulty of this case arose from the question of the right of distraint at common law and under the Statute of New York at that time, and it was held that as the property had been actually removed, the right of distress was gone, and that the goods were no longer the goods of the tenant; but that if the Receiver had taken possession of the leased premises or had otherwise elected to take the lease under the assignment, he would have taken it *cum onere*, and would have been the tenant of the premises, and the removal of the furniture would have been a removal of the goods of the tenant.

Walworth, Chancellor, said:

"The situation of the Receiver in this case is analogous to that of an executor, who cannot be charged as

the assignee of a lease if he waives the term, the income of which is not sufficient to pay the rent, although the estate of the testator may be liable for the rent in due course of administration, if the landlord refuses to re-enter. Such, also, is the law in relation to the assignee of a bankrupt. If the assignee elects to waive the term, and neither enters upon the demised premises nor does any act signifying his acceptance of the term as assignee, he is not liable for the rent; and the lessor must come in as a general creditor of the bankrupt's estate, or may sue the bankrupt for the rent subsequently accrued.

But if the assignee enters upon the demised premises, or does any other act which is equivalent, to signify his assent to accept the term as the assignee of the lease, he will become the tenant of the premises and render himself liable for the rent."

The Chancellor cites numerous authorities, English and American, from text-writers and adjudged cases, in support of these doctrines, and concludes that as the Receiver had done no act indicating his acceptance of the term, the landlord had no claim to distrain.

In *In the Matter of A. S. Brown, Receiver*, 3 Edw. Ch., *384, the Vice-Chancellor held that where the Receiver had not possessed himself of any property on which the landlord has a lien or right to distrain for rent, the landlord has no preference upon the Receiver's funds over other creditors.

This is equivalent to holding that a Receiver and assignee are governed in this regard by the same rule, and that where the Receiver does take leased property, the lessee has a preference in payment.

See also,

Hoyt vs. *Stoddard*, 2 Allen (Mass.), 442.
Boyce vs. *Blakewell*, 37 Mo., 492.

In *People* vs. *Universal Life Insurance Co.*, 39 Hun, 142, the Receiver of an insolvent company occupied and used the premises of the company, but failed to pay the rent accruing under the lease; whereupon the lessor applied for an order directing the Receiver to pay the rent. There was no dispute as to the facts.

The Court held that it was immaterial whether the Receiver was personally liable, or liable only as Receiver.

"If he were liable personally, still his occupation was in discharge of his official duties, and the Court would reimburse to him anything he should be compelled personally to pay.

If he were liable only as Receiver, then he could not justly enjoy the use and occupation of the property as Receiver without paying the rent. The rent, in that case, would not be a claim to be paid *pro rata* with debts of the company; it would be like his necessary expenses, a charge on the fund. If he had chosen to abandon the possession at once, he could probably have escaped liability for the rent accruing, but as he chose to enjoy the possession, he was bound to pay the rent which was the consideration therefor.

The liability which the church (the lessor) seeks to enforce is for the Receiver's own tenancy. It is against him as assignee of the lease, and not for a debt owing by the company."

In *Commonwealth* vs. *Franklin Insurance Co.*, 115 Mass., 278, it was held that Receivers of an insolvent insurance company are not responsible merely by accepting the trust and receiving the assets of the company, on the covenants of a lease previously made by the company. To bind them there must be an election on their part, or some act equivalent in law to an election.

The Court thus states the general doctrine:

"The Receivers were not responsible for this rent merely by accepting the trust and receiving the assets of the Franklin Insurance Company (*Hoyt* vs. *Stoddard*, *2 Allen*, *442*). They could have elected to take possession and assume the liability to pay the rent according to the covenants of the lease, if they had deemed it for the interest of the creditors so to do, but until such election or the doing of some act which would in law be equivalent to an election, they are not liable. As Receivers, they cannot be held merely on the covenants, but become liable solely by reason of their own acts (*Turner* vs. *Richardson*, 7 East., 335)."

The Court, in this case, proceeds to consider the special circumstances existing in this case relative to the question of an election or not, and uses this language:

"There must be some occupation and use of, or some dealing and intermeddling with, the estate, or some act, admission or agreement, which, in terms, or by necessary implication, indicates an election." And the Court cites numerous authorities to this point, and holds that in this case there was no election on the part of the Receivers to pay rent according to the lease.

"Although, by operation of law, the right or title to demised premises, under a lease, passes to the assignee of an insolvent debtor, yet he is not chargeable for rent unless he actually enters upon and enjoys the estate, or does some act indicating an acceptance of the lease."

Hoyt vs. *Stoddard*, 2 Allen, 442 (84 Mass.).

"There must be an acceptance by the assignee and the entrance of the leased premises, under and by virtue of the assignment. A lease is deemed property or not in such an assignment, at the election of the assignee;

and until he accepts it or elects to enter under it, it will not be binding on him. But, if he goes on the premises and actually occupies them under the assignment, he will be liable for use and occupation, as tenant, for the time he is so in possession."

Boyce vs. *Blakewell*, 37 Mo., 492.

Woodruff vs. *Erie Railway Co.*, 93 N. Y., 609, was a case which, in its facts, was very close to the present case, and the report of the case, with the citations of counsel, covers nearly all of the American cases which bear upon the present question.

The plaintiff was the lessee of the property of the Erie and Genesee Valley R. R. Co., whose property he, in turn, had leased to the Erie Railway Company.

The property of the Erie Railway Company, having subsequently passed into the hands of a Receiver, who refused to pay the rent due under the lease, suit was brought to recover the same out of funds in the hands of the Receiver, for four years—1875 to 1878 inclusive.

The Court found that, for upwards of three years, the Receiver, as such, continued in possession of the property, under the lease, and continued to use and operate it as a railroad in connection with the main and subsidiary lines of the Erie Railway Company.

In this case, as in ours, the manner of payment of rent under the lease was that the lessee should pay the interest upon certain mortgage bonds, and the lease contained other provisions quite similar to the provisions of the present lease to the Wabash.

The defendants set up different defenses which the Court first disposes of, and then proceeds to consider the question of the liability of the Receiver to pay the rent as provided for by the lease, and thus states the relations of the parties to the subject matter of the suit.

"The order appointing him Receiver was originally

made on the 25th day of May, 1875, in an action in the Supreme Court brought in the name of the people by their Attorney-General under the statutes regulating the jurisdiction of courts of equity over the estates of insolvent corporations, against the Erie Railway Company and the several mortgagees of the property of such road and all others interested therein for the purpose of dissolving such corporation and distributing its assets among its creditors.

A supplementary order in such action conferring additional power upon the Receiver was made by the same Court on the 29th day of May, 1875. By such orders it appeared, among other things, that the Receiver was authorized to take immediate possession of all of the property and exercise the functions of the said Erie Railway Company, and continue the operation of the road in the ordinary and usual course, as the same was then operated, and to purchase and pay for all such needful material and supplies as might seem to him to be necessary and proper, and to do whatever might be needful to maintain and preserve the corporate organization and franchises of the company until final judgment in the action, and to defray the necessary and proper expenses incident thereto. He was further authorized, in the exercise of a sound discretion, to pay any rent then due or that might thereafter become due under any lease then held by the Erie Railway Company in manner and form as provided by such leases respectively; and in order to prevent a forfeiture of any leases he was authorized to borrow money for the payment of such rent, and issue the usual Receiver's certificates therefor. It was also provided that the order should not be so construed as to require the Receiver to adopt and confirm such leases as he should find to be disadvantageous to all parties.

It appeared by the complaint and affidavits upon

which such order was issued that the Erie and Genesee Valley Railroad was one of nineteen other roads which were then leased, run and operated by the Erie Railway Company, and that the annual rental of such road was there described as being $8,400. * * * *

One of the principal objects contemplated by these orders was to enable the Receiver to continue the operation of the road and its dependencies, and to prevent any interruption of its business, which would materially impair the value of the road and the security of its mortgagees and creditors.

Invested with these powers the defendant Jewett, on the 25th day of May, 1875, took possession, not only of the property and effects of the Erie Railway Company, but also of the Erie and Genesee Valley Railroad, and all of its property and appurtenances, and continued to hold possession, and operate it in connection with the other lines belonging to the Erie Railway Company, until they were sold under the decree of foreclosure entered in the action instituted by the Farmers' Loan and Trust Company, in the spring or summer of 1878, at which time the possession of the property by the Receiver terminated. * * * *

It would seem to be entirely immaterial as to the source whence the funds in the hands of the Receiver were derived, or whether the particular portion of such road, covered by mortgages, contributed more largely to such fund than other portions not subject to such liens. Under the orders in question, the receipts, from whatever source derived, were to form one common fund, applicable in the first instance to the discharge of the obligations which the Receiver was thereby authorized to incur.

Whatever might be the respective rights of the various parties to this action as between themselves to priority in the participation of the assets of the insol-

vent Erie Railway Company, such rights could affect only the property remaining after the liabilities created under the receivership had been fully paid and satisfied. Under the orders referred to, it was not only within the power of the Receiver to assume the obligations of the several leases referred to, so far as the payment of rent either due or to grow due thereon was concerned, and discharge the same with any funds in his hands, but he was further authorized to bind even the *corpus* of the estate without regard to the rights of the several mortgagees therein in exercising the authority conferred upon him." (*Miltenberger* vs. *Logansport R. R. Co.*, 106 U. S., 286; *Langdon* vs. *Vt. Cent. R. R. Co.*, 50 Vt., 500; 53 *Id.*, 230; 54 *Id.*, 593.)

"The Receiver was not only thus authorized to assume the obligations of the lease and bind the estate in his hands to the payment of the rent accruing thereon, but by entering into the possession of and occupying such leased property, he manifested by an unequivocal act his election to regard the continuance of such lease as beneficial for all the parties interested, and his intention to continue the interest acquired by the Erie Railway Company under such lease. He could not take possession of the property and enjoy its use and occupation without incurring a liability for the payment of the rent under the lease by which his predecessor secured its possession. The principles which govern the liability of the assignee of a lease seem to be applicable to the case of a Receiver, and he would be equitably and legally chargeable with the payment of rent under a lease for such time as he continued to occupy the property demised.

While it was competent for him at any time to negotiate a new and secure a modification of the terms of the lease, with the consent of the various parties interested, or to repudiate the lease and surrender the property,

yet not having done so, he must be held to have continued his acceptance under the terms and conditions of the existing lease as to the payment of rent thereon.

His position has been said to be analogous to that of an executor who takes possession and enjoys the occupation of property held under a lease by his testator. He thereby becomes liable for the payment of the rent accruing during his occupation of the premises according to the terms of the lease under which it was acquired (*Martin* vs. *Black*, 9 Paige, 641). The assignee of a bankrupt also occupies an analogous position, and is subject to similar liability."

Turning now to cases in the United States Courts, *Ex parte Faxon*, 1 Lowell, 404, was a case in which certain parties had leased valuable premises, and afterwards were declared bankrupts; the assignees in bankruptcy continued to occupy the leased premises, but made no arrangement with the lessors concerning the rent; the lessors then applied to the Court for payment in full of the rent by the assignees. Lowell, J., said:

"An assignee in bankruptcy, unless restrained by the terms of the lease itself, may adopt or reject a term, as he find most beneficial for the creditors, and may take a reasonable time to decide the question. If he takes the lease, he makes himself liable, on behalf of the estate, for the rent, including, at least, that of the current quarter, and this he must consider in determining whether to adopt the lease. The petitioners would have done more wisely, perhaps, to insist on this at the time, but I see no ground for saying they have waived any of their rights. In theory of law, the assignees have been in possession ever since the petition was filed,

and not only from the date of the adjudication, which is merely a finding that the petition is well founded. If the quarter-day had come round pending the petition, the bankrupt would have been authorized, if he found it necessary, for the best interest of his creditors, to pay the rent in order to save an ejectment. I have more than once permitted this to be done ; and the assignees, by the course they have taken, affirm this to be a case in which such a course was prudent and proper."

In *In re Merrifield*, 3 N. B. Reg., 98 (2d Edition), a bankrupt had his stock of goods in premises leased by him under a verbal lease from May 1st, 1868, to May 1st, 1869, at the rent of $1,600 a year ; upon filing his petition in bankruptcy he surrendered his property to the Register, and delivered the key of the premises. After the appointment of an assignee, the key to the premises was delivered to the assignee, who took possession of the goods, which were sold under the assignee's order. Towards the end of April, 1869, the landlord applied to the assignee for the key, and he immediately delivered it up. The premises were not occupied by the assignee after the 1st of April, and he was ignorant of who the owner was. The landlord claimed rent from the assignee from December 26th, 1868, the date of the filing of the petition in bankruptcy, to February 1st, 1869, the date when the landlord executed a lease to a stove company ; and the stove company claimed rent at the rate of $2,000 per annum—the rent which it had stipulated to pay—to May 1st, 1869.

Blatchford, J., after stating the facts, said :

"I think the assignee ought to pay rent for the store from December 26th, 1868, to April 1st, 1869, at the rate of $1,600 per annum and for no other period at any rate."

The *ratio decidendi* of this case is plainly that where leased premises are used by the assignee in bankruptcy he is chargeable with rent, according to the terms of the lease, during the period of his actual occupation, but not beyond the time when he ceases to use the premises. It seems further in this case to have been regarded as sufficient to excuse the assignee from payment of rent, that he did not occupy the premises during the last month of the term, and did not know who was the owner; the plain implication being apparently, that if he had known who the owner was, it would have been his duty at least to have tendered back the premises.

The case of *Fosdick* vs. *Schall*, 99 U. S., 235, supports our present claim.

In that case Schall had made a contract of sale of certain cars to a railroad company in Illinois, payable in instalments, the cars to remain until fully paid for, the property of Schall. Prior to this contract the company had mortgaged its property, both present and future, to secure a loan. Subsequently, under a bill to foreclose the mortgage, a Receiver of the property was appointed who agreed with Schall upon a monthly rent of $7 each for the cars.

Schall subsequently intervened in the foreclosure suit and claimed payment for the use of the cars from the time when the last instalment of the purchase money was paid, and that the cars be returned to him. Subsequently the mortgaged property, not including the cars was sold and conveyed to purchasers, and it was decreed that as Schall had not parted with his title, the cars should be returned to him, and that he should be paid out of the funds in Court the sum of $14,568.75, as rent for the cars while in use before the appointment of the Receiver, the fund in Court being merely the proceeds of the sale of the mortgaged property.

The Supreme Court, on appeal from this decree, after holding that the lien of the mortgage did not attach to the cars so as to bar Schall's claim, held that the payment out of the earnings of the road for the rent, for the time they were used by the Receiver was proper.

It is true that in *Fosdick* vs. *Schall* the rent paid was that which was agreed upon between Schall and the Receiver, but the decision of the Court justifying the payment of rent in that case, proceeds throughout upon the theory that the estate in the hands of the Receiver is bound for all liabilities which the Receiver, under the direction of the Court, has assumed for the protection in general of the estate. If in that case the fact had been that the cars in question were originally leased at a fixed rental to the company, and the Receiver, upon coming into possession, had continued to use the cars, there would seem to be no doubt, under the principles laid down in *Fosdick* vs. *Schall*, that the Receiver would have been bound to pay the rent prescribed in the lease.

The case of *Miltenberger* vs. *Logansport R'y Co.*, 106 U. S., 286, is still more directly an authority in support of our claim.

In that case the mortgagor Railroad Company held a leased road under a written lease providing for rent and for payment for depreciation, and for the payment back of a monthly rent by the lessor to the lessee for the use of a part of the road. The successive Receivers appointed in a suit to foreclose the mortgage, took possession of the leased road and, operated it as a part of the mortgaged road. The Receivers paid part of the rent due to the lessor, and collected from him the monthly rent due by him for the use of a part of the road, and the Court below allowed the lessor, as a claim

preferred to the mortgage, a sum based on the actual value of the use of the road by the Receivers, and for its depreciation, along with preferred claims for supplies and materials furnished to the Receiver.

On appeal to the Supreme Court, it was held that these allowances were proper.

"Specific objection," says Mr. Justice Blatchford, "is made to the allowance of the claim of the Evansville Company to be paid in preference to the first mortgage bonds. The Evansville road ran from Rockville to Terre Haute, twenty-three miles. The mortgagor had in June, 1872, hired that road by a written lease, the term of which was for one year, and until one year's notice of its termination should be given by either party after that term. The rent was $2,012.50 per month, and the lessee was to maintain the road in as good condition as when received, and to permit the Evansville Company to use six miles of it at a stipulated price. Provision was made in the lease for initial and subsequent inspection of the road to ascertain its condition, and any improvement or depreciation the lessor or the lessee was to pay the other party for in accordance. The lessee used the road from July 1, 1872, until the Receiver was appointed. He took possession of it and ran it while he was Receiver, as a continuation of his road, and so did he and Claybrook afterwards, and subsequently Claybrook, as sole Receiver, did the same. The rent was paid to September 1, 1874, then for a year it was not paid, then it was paid for four months, then it was unpaid to August 12, 1876, and after that Claybrook, as Receiver, paid it as it accrued. During all the time from September 1, 1874, the successive Receivers collected from the Evansville Company every month $262.50 for the use of the six miles. In the winter of 1876 there was found, on inspection, a depreciation of $19,346.82. The Evansville Company made a claim against the Receiver for the un-

paid rent, the amount of the depreciation, the value of certain supplies, and the rent of an engine. The Master reported as due $56,036.21. On exceptions, the Court directed the Master to ascertain what would be a fair rental value for the use of the leased property by the Receivers, and to take into consideration any dilapidations. On this basis a new report for $35,318.62 was made, and this amount was allowed with a preference. We see no valid objection to this allowance. It is on the basis not of the lease, but of the actual value of the use of property used by the Receivers, with the clear assent, under the circumstances, of all parties interested, which use the first mortgage bondholders and their trustee, chargeable with full knowledge, never sought to prevent, such use being founded on the lease, which was property in the hands of the mortgagor. The line was used for the benefit of the mortgagor's road and of the holders of the bonds under the mortgages with their acquiescence. Whatever the Court would have done as an original question, if called on to determine whether the Receiver should use and run the Evansville road, these appellants must now be held, in view of all the facts, to have consented to treat the right to run that road, and take its income, as if that right were a part of the mortgaged property, and subject to the same rules as the other mortgaged property. This leads to the allowance, also, of the claims for operating supplies and materials, including steel rails, furnished for that road while so run."

It is true that in *Miltenberger* vs. *Railway Company*, the rent allowed by the Court below was, as the Supreme Court says, "on the basis, not of the lease, but of the actual value of the use of the property used by the Receivers;" but this is by no means a statement of the

ground on which such an allowance is warranted, but merely a statement of the fact as it existed in that case; in other words, it is a statement of a fact, and not of a principle.

But the following language of the Court is very significant:

"Whatever the Court would have done as an original question, if called on to determine whether the Receiver should use and run the Evansville road, these appellants must now be held, in view of all the facts to have consented to treat the right to run that road and take its income as if that right were a part of the mortgaged property and subject to the same rules as the other mortgaged property."

This clearly means that the Court might have determined at the outset that the lease was not advantageous to the estate in the hands of the Receiver, and might have declined to accept the property under the lease; but that, having accepted, held and used the property under the lease—that is to say, without terminating, expressly or by implication, the lease—all parties must be treated as having consented to take the lease and to pay its obligations out of the income of the mortgaged estate. The principle here laid down fully covers the claim we make in the present case.

But it is further to be observed that in the *Miltenberger* case the lessor appears to have been content with the amount awarded to him as the actual value of the leased property, and that hence no appeal was taken by him or in his behalf, and the question of his right to claim the rent reserved by the lease did not arise and could not have arisen.

The case of the *Union Trust Company* vs. *Illinois Midland Railway Company*, 117 U. S., 434, follows generally the principles laid down in *Fosdick* vs. *Schall*,

and *Miltenberger* vs. *Railroad Company*, though the facts of that case do not bring it so closely to our present case.

A diligent search of the authorities has not furnished us with any case, or statement of principles, which is not in harmony with the authorities which we have now cited, and it only remains to apply these authorities to the case in hand.

The cases of *Ellis* vs. *Boston, Hartford and Erie Railway Company*, 107 Mass., 1, and *Matter of Receivers of the New Jersey and New York Railway Company*, 29 N. J. Eq., 67, are neither of them opposed to the views maintained in this brief.

In the former case the railroad company had made an indenture of mortgage, by which it was provided, that until default the use and control of the railroad premises should remain with the corporation, but on a default for six months the trustees should take and operate the road, collect the income, etc., and that if the default should continue for eighteen months after possession taken, all equity of redemption should be foreclosed, and the mortgaged property should vest absolutely in the trustees. The trustees took possession under the mortgage. The Adams Express Company, after the making of the mortgage, contracted with the railroad company to carry express matter over its lines, the amounts due to the railroad for freight to be applied in repayment of money to be advanced by the express company. In 1871 the express company filed a petition against the trustees under the mortgage, praying that they might be restrained from refusing to transport express matter and freight for the express company under the contract specified.

It was held that the trustees were not bound by the

contract. The grounds of this decision are made perfectly apparent by the Court. It says:

"The trustees are not officers of the Court, and do not act under its direction. Their possession and right of possession are conferred by decree of the Court, but beyond that they stand upon their own rights as mortgagees; for the extent and measure of those rights, the instrument of the mortgage is the guide. . . . . We are satisfied that it was the right of the trustees to refuse all performance or recognition of the contract of the petitioners with the corporation. . . . . The right of the mortgagees is an absolute one. . . . . It is a legal right which cannot be limited. . . . . The parties must be remitted to their legal rights."

The case of the *New Jersey and New York Railway Company*, 29 N. J. Eq., presented the fact of two railroads, both insolvent, and in the hands of Receivers appointed under statutory insolvency proceedings. A contract had been made between the two companies prior to their insolvency, as to the use of terminal facilities, and for the use of a part of one road by the other. The Receivers of one road, by petition, asked that they be relieved from the burden of the contract, on the ground that it was prejudicial to the interests which they represented. The Court held that it had power to modify this contract, so as to make it equitable under existing circumstances, but it places this power apparently upon the ground that the Court had control of both parties to the contract and their property, under proceedings in insolvency.

The Court says:

"The application is opposed on the ground that it is not in the power of this Court to reduce the compensation fixed in the contract; that this Court cannot impair the obligation of the contract. Both the companies are

insolvent, and their property is in the hands of Receivers, appointed by this Court under proceedings in insolvency. The Statute (*Rev.*, p. 196) makes it the duty of this Court to operate these railroads for the use of the public. . . . The Court, of course, will not take the property of one railroad company for the benefit of another. . . . But, if there be necessity for so doing, it will not hesitate to modify the terms on which the facilities are furnished, wholly ignoring, if need be, the bargain made between the two insolvent companies, always taking care, however, that the company furnishing the facilities receives due compensation therefor."

The matter was therefore referred to a special master to ascertain and report, &c.

The distinctions between this case and our present case are palpable. In the former case, the Court was dealing with two insolvent corporations, each placed in its hands under the State's statute, to be operated for the accommodation of the public. In the present case, the Court has custody and control only of one insolvent corporation—the Wabash—the Quincy, Missouri and Pacific being at all times a solvent corporation.

In the former case there was no question of the payment of rents, &c., which had already accrued, but the question was simply as to the continuance of the contract. In the present case, the sole question is whether the Wabash Receivers shall pay for what they have had, viz., the use and control of all the property of the Quincy, Missouri and Pacific, from May 27, 1884, to August 1, 1885.

It has been urged, in the present case, that the Receivers did no act which indicated unequivocally their election to adopt the lease here in question.

The cases already cited make it clear that actual

entry, occupation, and use by Receivers of leased premises are unequivocal evidence of an election to adopt the lease.

It is undisputed that the Receivers here actually took, held and used the railroad of the Quincy, Missouri and Pacific Railroad Company continuously from May 27, 1884, to August 1, 1885; and it results that they thereby became liable for the rent reserved in the lease and for all the burdens and obligations imposed by the lease, unless there were such peculiar circumstances connected with the case as take it out of the general rule.

II.

There are no circumstances in this case which should have the effect of excepting it from the general rule which we have found to prevail.

It is necessary at this point to set forth particularly the special circumstances of the appointment, and subsequent conduct of the Receivers in this case.

The fact has already appeared, that the Receivers were appointed upon the application of the Wabash, St. Louis and Pacific Railroad Company, upon a bill of complaint filed by the company for that purpose, May 27, 1884, (Record, fols. 67–88).

Upon this bill alone, the Receivers were appointed on the same day,

(fols. 89–92).

The bill of complaint of the Wabash Company set forth in general, (1), the fact of the formation of the railway of the Company by the consolidation and lease of many originally separate and independent lines ; (2); the acquisition of other lines in part by consolidation and in part by purchase ; (3), the lease of numerous other lines ; (4), the execution of the general mortgage covering all the property however acquired, of the Wabash Company; (5), the financial embarrasments of the Company ; (6), the danger of disintegration, &c., if the property were left to be subjected in the ordinary manner to the claims of its creditors ; and (7), the disastrous result of such disintegration.

The bill upon these grounds prayed the appointment of Receivers.

The following statement is part of this bill.

" Further complaining, your orator further shows unto your Honors that your orator is also a lessee of certain other lines of railroad located within the said several States, and your orator has operated all the said lines as a unit until recently, when said lines were leased by the orator to the St. Louis Iron Mountain and Southern Railway Company, a corporation existing under and by virtue of the laws of the State of Missouri, and that said last named Company now operates all said lines of railroad as the lessee of orator."

The following statement is also part of this bill :

" Your orator further showeth unto your Honors that several of the leasehold interests possessed by orator are of extreme importance, as some of the lines so leased form valuable links in the chain of your orator's lines, as for instance a leasehold interest under the Western Indiana Railroad Company, by means of which orator reaches its terminus in the City of Chicago and is enabled to do a valuable business there.

That under the terms of said leases the lessor com-

panies will be enabled to declare a forfeiture of orator's rights unless promptly paid the rentals accruing therefor, and that unless some provision is made by which said rentals as may be shortly matured can be promptly met, your orator's leasehold interests or some of them of great value will be declared forfeited and wholly lost to orator, and orator's lines and power of earning money will be thereby very seriously affected."

The following is a part of the prayer of the bill :

"Orator also prays that such orders be made as would enable such Receiver or Receivers to raise money with which to pay all rentals accrued or accruing, the payment of which are necessary to prevent the forfeiture of orator's valuable leasehold interests, and thus prevent the breaking up of orator's lines.

That your Honors will order and direct that said Receivers after paying the current expenses of operating and maintaining said railroads and also paying for all labor, supplies, rentals and services aforesaid . . . . apply the residue or surplus of all incomes, &c. . . . . to the discharge of all debts, obligations and liabilities of orator, &c. . . . . "

The order appointing the Receivers also contained the following paragraph.

"That said Receivers also in like manner pay all rental accrued or which may hereafter accrue upon all leased lines of said complainant and for the use of all terminals or track facilities and all such rentals or installments as may fall due from said complainant for the use of any portion of road or roads or terminal facilities of any other company or companies, and also for all rentals due or to become due upon rolling stock heretofore sold to complainant and partially paid for."

The anomalous character of the entire proceeding which thus resulted in the appointment of these Receivers is conceded by everyone.

Thus, the Circuit Judge, in his opinion, (fol. 54), says :

" The idea which underlies this bill is that which underlies the action of a voluntary bankrupt under the bankrupt law. Finding himself insolvent he surrenders his property to the Court to be disposed of for the benefit of his various creditors. . . . . It may be said that the theory of the bill was novel ; that seldom it is that the mortgagor, the debtor, applies for a receivership."

The opinion of the Circuit Judge also concedes the proposition of law stated by all the authorities, to the effect that rent of property taken by Receivers under a pre-existing lease becomes, in the absence of other arrangements of the Receivers with the lessor, a charge against the Receiver and through him against the *corpus* of the property if the income be insufficient. Of this proposition, after quoting it from *High on Receivers*, he says (fol. 53) :

" This proposition, fortified as it is by ample citatons, is conceded, but is it applicable? This receivership was upon application of the mortgagor, a party in possession of various properties—some owned, some leased, and all subject to various obligations."

The opinion of the District Judge also concedes the correctness of the rule on which we insist, saying (fol. 61).

" If an assignee in bankruptcy, public liquidators, receivers of insolvent corporations, or Receivers appointed under proceedings to foreclose mortgages, take possession of the property of a third party, held under a lease, and use it ostensibly for the purpose of administering advantageously on the assets in their hands, or

at the instance of and for the benefit of mortgagees, full rent must be paid for the use of such property out of any funds within the control of the Court and without reference to the question whether the use of the leased premises proves to be beneficial or otherwise.

There is in fact no difficulty in deciding what the law is. The difficulty lies in making a correct application of it to the particular case under consideration, or rather it lies in determining whether the present proceeding was of *such an exceptional character that the principle invoked to establish the liability in question is applicable.*"

He further states his view of the character of the bill of complaint as follows :

"As I understand the bill of complaint, the complainant professes to be acting not alone in the interest of mortgagees but in the interest of all the corporations whose roads had become the integral part of the system, whether by lease, consolidation or otherwise.

It was substantially represented by the bill, that the affairs of the complainant had become so complicated by the various mortgages that had been executed, the consolidation that had taken place and the leases made or assumed, and by the admixtures of rolling stock, that the best interests of all parties concerned demanded the appointment of Receivers over the whole system, as the only feasible method of working out of the equities appertaining to each.

It was on account of such representations that the Receivers were appointed and ordered to take possession of the whole system. In other words, the receivership was not created for the benefit or protection of any one interest or class of interests but for the benefit of all parties to the suit who are in any way interested in the system."

Such were the circumstances of the appointment of these Receivers. We do not deem it necessary, however, to discuss the propriety or legality of the original appointment. That it was anomalous, if not unprecedented, is admitted. The question is, does the anomalous character of the appointment of the Receivers so change the legal effect and incidents of their appointment as to take the leased lines which were held and operated by the Receivers out of the ordinary rule requiring the payment of rent as reserved in the leases?

(*a.*) *However the appointment of Receivers was made, they were, when appointed, of the same character as other Receivers appointed by Chancery Courts, and their acts have the same effect as if they had been appointed in a suit to foreclose a mortgage.*

There is no authority for a new kind of Receivers, even if new grounds for their appointment have been discovered.

The standard definition of a Receiver is, a ministerial officer of a Court of Chancery, appointed as an indifferent person between the parties to a suit, to take possession of and preserve, *pendente lite*, the fund or property in litigation—a mere custodian, having no powers except those conferred by the Court, whose acts within the scope of his authority are the acts of the Court appointing him, whose holding is the holding of the Court, and whose pecuniary obligations, in the absence of fraud, are the obligations of the fund or property which he holds.

Except in matters regulated by express statutes, no other kind or class of Receivers is known to the law. The present case is one strictly of ordinary Chancery Receivers; and whatever were the circumstances or

grounds or theories of their appointment, they became, when appointed, no more and no less than ordinary Chancery Receivers.

All this is expressly asserted by the Circuit Judge in the interlocutory opinion which is made part of the record (fols. 148*b*-151).

A motion having been made by the Central Trust Company and James Cheney, trustees, upon the filing of their cross-bill to foreclose the General Mortgage, June 9, 1884,—almost immediately after the original appointment of the Receivers—to reappoint these Receivers or to extend their receivership to the mortgagees in that suit, the Circuit Judge, in denying the motion, said (fols. 149, 150):

"Application is also made for the appointment of Receivers, or, as stated in the language of the motion, for extending the receivership to the Trust Company, the mortgagee, in the General Mortgage. I confess that I do not wholly understand why such an order as that is asked, and I cannot appreciate what counsel mean when they say, make the Receivers, Receivers for the Trust Company, the mortgagee.

As we look upon it, the Receivers are not Receivers for either party. They are simply the hand of the Court. In the process of the litigation, the Court has taken possession of the property, and holds it neither for the mortgagor nor the mortgagee, and it matters not for the ultimate determination of the suit at whose instance the Receivers were appointed. They act for neither party. They represent neither party. They stand here simply as the hand of the Court, holding the property for disposition at the end of the litigation for the benefit of all.

So I cannot see what can be gained as a legal proposition by a new order of appointment extending

the receivership, as counsel say, to the Trust Company, the mortgagee. *The Receivers will have no greater power, no different power, would owe no different duty, and would be no more and no less subject to the orders of this Court than they are now;* and certainly they would have no right in the operation of their trust to extend favors to the one side or the other.

Furthermore, as Receivers appointed at the instance of the mortgagor in the first instance, they took possession of the entire property, while this order as tendered contemplates the seizure of a part only of these properties, not all. Having taken possession of the road under the idea, in the first instance, that the integrity of the system had a value and should be preserved, it seems to us, the receivership should continue right along in that line. There will be no reappointment of the Receivers."

No more explicit statement could be made than this of the character of the Receivers in this case. A motion is made to reappoint these Receivers in the suit for the foreclosure of the general mortgage; and the Court denies the motion on the express ground that the Receivers asked for would "*have no greater power, no different power, would owe no different duty, &c.,*' from those of the Receivers already appointed.

In spite, however, of this emphatic assertion by the Circuit Judge of the ordinary character of the Receivers—though conceding the extraordinary occasion of their appointment—counsel have heretofore contended, and the District Judge urges (*fols.* 60–65), that the Receivers were appointed *for the benefit of the lessor companies as well as of the mortgagor company*, that is, for the benefit, in this instance, of the Quincy, Missouri and Pacific, as well as of the Wabash Company, and that being so appointed, the cost of the receivership,

especially the rent of leased lines, cannot be charged against the Receivers or the mortgaged property of the Wabash Company alone, as in ordinary cases of Receivers.

In the first place, there is no foundation of fact for such a theory to rest on. Neither the bill of complaint of the Wabash Company, nor the order of the Court appointing the Receivers, conveys the idea or advances the theory that the appointment of the Receivers was for the benefit to any extent of the leased lines.

The bill did present the view that the interests of *all the creditors of the Wabash Company* should be protected, and that the appointment of Receivers, as proposed, would so protect all these creditors, but not a word is said of protecting *the interests of the leased lines*, or, in particular, of the interests of the Quincy, Missouri and Pacific Railroad.

But the better answer to this position is, that as the Quincy, Missouri and Pacific was never insolvent and no allegation to that effect was ever made in the proceedings in the present instance, the property of that company here in question could not have been seized or placed in the hands of the Receivers, except as to the leasehold interest held by the insolvent Wabash Company. The Court below never had jurisdiction or power to deal with anything connected with the property of the Quincy, Missouri and Pacific Railroad, except the interest of the Wabash Company as expressed in the lease now under consideration.

It has been said and repeated over and again, in the course of this controversy, that the property of the Quincy, Missouri and Pacific was taken into the custody of the Court, under the Wabash Receivers, for the benefit of the lessor company, the Quincy, Missouri and Pacific. No statement could be more unfounded. As

we have before said, the lessor company was never insolvent. No one ever asked for the appointment of a Receiver of its property, and the Court could not possibly have dealt with its property or subjected it to the custody of the Receivers, except as to the interest of the Wabash Company through this lease.

The Wabash Company was insolvent, and in taking its property for the benefit, as was claimed, of *all its creditors*, the Court took the leasehold interest of the Wabash Company in the Quincy, Missouri and Pacific Railroad Company's property, that is to say, its right to hold and occupy that property under the terms of an existing lease. The suggestion, or claim, or pretence, that the Court could have taken this property *for the benefit of the lessor*, is as contrary to all reason and fact as it is to all law.

The argument, therefore, much pressed heretofore, that no recovery for rent can be had here, because the operation of the Quincy, Missouri and Pacific Railroad was continued by the Court for the benefit, in whole or in part, of the lessor company, is seen to be without foundation.

III.

It has also been urged that the fact that the Court itself ordered the Receivers to take the leased property, deprived the Receivers of all discretion; and that consequently they have not exercised an election to accept the lease in this case.

It has already been shown that it is essential in or-

dinary cases that the Receiver should, by some clear act, indicate his election to accept an existing lease, in order to bind himself to pay the rent fixed in the lease.

The Receivers here, it is true, were directed by the order of their appointment to take the leased lines, but they were not compelled or compellable to act under this order. When a Receiver obeys such an order of Court, he obeys voluntarily, because he may always decline the service of Receiver. The act of the Receivers in taking the leased property and continuing to hold and use it under the order of the Court, was, in every sense, *an election by the Receivers.*

But, if it could be held that the action of the Receivers following the order of Court, was not such an election by them as bound them and the estate in their hands for the payment of this rent, this would simply transfer the origin of our claim from the Receivers *to the Court itself.* If the Receivers did not elect to take the property under the lease, the Court did. Can the Court, no matter how great its powers or jurisdiction, hold and use, under a lease, the property of one who is solvent and makes no application for the aid of the Court, and then hold that because the Court and not the Receiver made the election, no rent shall be paid? The question needs no consideration. The Court is as incompetent to do this as the Receivers would be. The test is: Was the property held and used by the Receivers in the execution of their duty as Receivers; and it is perfectly immaterial whether they held it as the result of their own judgment or choice, or in the execution of an order of the Court.

IV.

It is also said that the Court gave notice by its orders to the Receivers of June 28, 1884, and of April 16, 1885, that it did not intend to pay rent under this lease; and that it was then the duty of the lessor company to recover its property, and that it cannot claim rent thereafter.

The facts upon which this position depends are these:

On June 26, 1884, the Receivers, by petition, asked advice from the Court, among other things, as follows:

5th. "As to how they should dispose of the earnings and keep the accounts of the earnings and of the operating expenses and cost of maintenance of the several other lines or divisions aforesaid, and which have not, and which your petitioners are informed and believe, will not, for the present, be enough to pay their operating expenses and cost of maintenance, and interest on the several series of bonds secured by mortgage upon them respectively" (fols. 94–110).

On June 28, 1884, the Court, in answer to this request, directed as follows:

3d. "And it is further ordered that the Receivers herein, until otherwise directed, keep the accounts of all the earnings and incomes from, as well as the accounts of all the operating expenses, cost of maintenance and taxes upon, the following lines or divisions of said property separately, to wit: . . . . . .

* * * * * * *

3. The Quincy, Missouri and Pacific Railroad, commencing at West Quincy and extending to Trenton in the State of Missouri.

* * * * * * * * * * *

And that said Receivers make quarterly reports thereof, showing not only the income and expenses of each of the lines aforesaid, but also the methods by which the incomes and expenses of said lines were respectively ascertained."

Under this order the Receivers reported from time to time the results of their operations of the property of the Quincy, Missouri and Pacific Railroad (fols. 137–144);

And on March 20, 1885, the Receivers, by petition, prayed for instructions, as follows:

"Your Receivers, therefore, pray your Honors to make such orders with respect to the future operation of said lines and concerning the payment of the respective rentals agreed to be paid by said Wabash, St. Louis and Pacific Railway Company in the several leases and agreements aforesaid, as to your Honors shall seem meet."

On April 16, 1885, the Court made the following order, this order being entitled "IN THE MATTER OF THE APPLICATION OF THE RECEIVERS FOR THE CANCELLATION OF CERTAIN LEASES" (fols. 148–151.)

The Court first lays it down as the duty of the Court when it takes possession of railways through its Receivers, to discharge the duty which the railway companies owe to the public, "of operating the road for the benefit of the public." It then says: "This Wabash Road as a system was in operation, a going concern from one end to the other, as such discharging its duties as best it could to its various creditors. This Court, at the instance of the corporation and to preserve the integrity of this system, took possession of it by its Receivers. It took possession of it as a going concern, and so far as is reasonable and practicable, it should con-

tinue it as a going concern until it surrenders it to whoever may be the purchasers or future holders of it."

The Court then proceeds to lay down certain rules as to the payment of rent of leased lines.

The first rule is that the accounts of the several divisions of the Wabash Company be kept "separately."

"2d. That where any subdivision earns a surplus over expenses, the rental or subdivisional interest will be paid to the extent of the surplus, and only to the extent of the surplus."

"3d. *Where a subdivision earns no surplus, simply pays operating expenses, no rent or subdivisional interest will be paid.* If the lessor or subdivisional mortgagee desires possession or foreclosure, he may proceed at once to assert his rights. While the Court will continue to operate such subdivision until some application be made, yet the right of a lessor or mortgagee whose rent or interest is unpaid, to insist upon possession or foreclosure, will be promptly recognized.

That, it is true, may work a disruption of the system, but the proceeding for disruption will come from the subdivisions. The Court is not sloughing off branches, tearing the system in two, but disruption, if it comes, will come from those who seek separation and have a legal right to so do."

"4th. That where a subdivision not only earns no surplus but fails to pay operating expenses, the operation of the subdivision will be continued, but the extent of that operation will be reduced with an unsparing, though a discriminating hand."

It may be observed at once in regard to the foregoing action of the Court and the circumstances under which such action was taken, that the petitions of the Receivers did certainly furnish an occasion for saying, and did suggest to the Court to say in terms whether or not the Receivers should continue to operate the Quincy, Missouri and Pacific road under the terms of the lease. The order of the Court of April 16, 1885, is, as we have seen,

specifically entitled, "*In the matter of the application of the Receivers for the cancellation of certain leases*," among which was the lease here in question.

It is a sound canon of construction of all written instruments, and is specially applicable to an order of Court, that when a matter or an idea is seen to have been distinctly presented to the mind of the writer, and he fails to embody it in the written document, the conclusion is, that the writer did not intend to so embody it. This rule applies in this instance perfectly. The matter of the continuance of the lease of the Quincy, Missouri and Pacific Railroad at the risk and expense of the Wabash Company was plainly presented to the Court by the Receivers, and the Court failed absolutely to direct that the lease be thrown up or canceled, or that the operation of the road be discontinued, or even that any notice of such a purpose should be given to the lessor company.

On the contrary, the Court in careful and studied terms avoids such an order or any notice of such an order, and limits itself, first, by its order of June 28, 1884, to directing that separate accounts be kept of the income and expenses. In other words, the Court said in this order in exact substance: "We will not discontinue this lease nor notify the company that we intend to discontinue it in the future, but will simply keep the accounts separately."

The road having remained thus in the hands of the Receivers under the lease until April, 1885, we find that the Receivers again prayed instructions concerning the operation of certain lines (including the Quincy, Missouri and Pacific), and "concerning the payment of the respective rentals agreed to be paid by said Wabash, St. Louis and Pacific Railway Company, in the several leases aforesaid;" and they further state that from May

29, 1884, the date of the appointment of the Receivers, to November 30, 1884, the expenses of the Quincy, Missouri and Pacific road, exclusive of rental, had exceeded its earnings by the sum of $10,201.93.

On April 16th, 1885, the Court passed upon the last named petition of the Receivers. After disposing of various other matters, the Court said that where any subdivision should earn a surplus over expenses, the rental should be paid to the extent of the surplus; and

"3. Where a subdivision earns no surplus, simply pays operating expenses, no rent or subdivisional interest will be paid. If the lessor or the subdivisional mortgagee desires possession or foreclosure, he may proceed at once to assert his rights. While the Court will continue to operate such subdivision until some application be made, yet the right of a lessor or mortgagee whose rent or interest is unpaid to insist upon possession or foreclosure will be promptly recognized."

The Court further said, on the same page, that where a subdivision earned no surplus and failed to pay operating expenses, the operation of the subdivision would be continued, but as economically as possible, leaving the extent of such economy necessarily to the discretion of the Receivers.

It is the last named order that is pointed to as absolutely conclusive to the effect that no rent can be recovered upon the present petitions.

But it is certainly impossible to hold that this order of April, 1885, made nearly one year, after the Receivers were appointed and had taken and operated the Quincy, Missouri and Pacific Road, can have retroactive effect, and cut off claims for rental for the period antecedent to its date. The only question which can arise upon this order is, how it affects our claim for rent

from its date, April 16th, 1885, to August 1st, 1885, when the road was surrendered to the trustees.

Upon this question we respectfully submit that this order of the Court could not have the effect, without some assent, express or implied, of the lessor road or roads, to cut off the claim for rent reserved in the lease, so long as the Receivers under this order continued to hold and operate its railroad. That a Court or a Receiver, assignee or other person in like capacity, can say to a lessor, "We will keep and use your property, which came into our hands under a lease, but we will pay you no rent therefor unless there is a surplus of net earnings," is, we respectfully submit, a new doctrine. We admit that the Receivers might have said, "We repudiate the lease from this time on, and we shall not undertake to pay rent under the lease," and if upon such notice the lessor did not recover his property and care for it himself, it is possible the lessee would be excused from further payment of rent, even if he had retained possession of the property to a sufficient extent to save it from destruction or great loss. But what was done in this case, was that the Receivers announced, by the Court, that they should not pay rent unless there was sufficient net earnings, and thereupon proceeded to retain and operate and use the road as they had previously done, until August 1st, 1885.

What we have said of the Receivers, is, we think true of the Court; that it cannot, according to law, retain leased property and use it and operate it at its will, under a lease, without the assent, express or implied, of the lessor, to any modification of the lease, and refuse to pay the rent reserved in the lease.

We do not question that the Court might have said—"We have concluded not to keep your road because it is not for the interest of the Wabash Company to do so," or—"We repudiate the lease, we cancel it, as we

have power to do, and we will not be bound by it." But what the Court in fact did, was to hold the property under the lease—we say "under the lease" because the Court never had any other legal power or control of the property than that derived from the lease—and simply tell the lessor that it would pay no rent! What the Court did, was to say to the lessor—"We will keep and operate your road but we will pay you nothing unless your road earns a surplus in our hands!"

The lessor had a right to say, "As long as you keep the road, you keep it *under the lease;* if you say you do not want it and will not pay the rent, I will resume it, but I am not bound to do so until you repudiate or cancel the lease and notify me to take my property. The law requires that while you keep the property under the lease, *you shall pay the rent reserved by the lease.*"

How, we ask again, did the Court get or hold this property of the Quincy, Missouri and Pacific Company? Solely, *by virtue of the lease.* On no other ground, had the Court the least right to meddle with it. So long as it held it, therefore, in the absence of any new agreement or of any modification of the existing lease, the Court and its Receivers held it under the express provision of the lease existing when the Receivers were appointed.

This position is made the stronger when it is considered for what purpose the Wabash Receivers and the Court retained the property of the Quincy, Missouri and Pacific, after the order of April 16th, 1885. It was expressly for the purpose (fol. 148 *e*) of "administering the consolidated property," and to fulfill (same folio) "the duty which every railroad corporation owes to the public."

Of course, the only railroad or "railroad corporation" which at that time the Court below had charge of or whose duty to the public the Court was concerned with,

was *the Wabash*. And consequently the only duty which the Court could have been authorized to discharge for any corporation was a duty *due by the Wabash*. The Quincy, Missouri and Pacific Railroad Company had never submitted its affairs to the control of the Court, and the Court had appointed no Receiver of its franchises and property. It was an entirely solvent corporation, whose only misfortune was that it had leased its road to the insolvent Wabash.

It results, that if the Court below was authorized to run and operate the Quincy, Missouri and Pacific Road for *the public benefit*, regardless of the pecuniary consequences—which seems to be the doctrine laid down by the Court at folio 148 *e*—or, if the Court had power to authorize its Receivers to discharge such a duty, it was a duty due to the public, not by the Quincy, Missouri and Pacific, but by *the Wabash alone*, and consequently the expense or loss incurred in discharging this duty is chargeable to the Wabash alone.

Such is the thought expressed by the Court below at fol. 148 *e* of its opinion. The remarks of the Court all plainly have reference to a duty supposed to be due to the public from the Wabash. For example, the Court says: "That duty (of operating the road for the benefit of the public) is not limited to the operation of merely that particular fragment of a road which is pecuniarily profitable in its operations, but it extends to the road as an entirety and to all its branches, all its parts, differing in that particular from the duty which would rest upon the Court if it had simply taken possession of property used for private purposes, manufacturing or otherwise, where the single question might well be said to be one of pecuniary profit."

But that the idea and purpose of the Court was limited to the interests or duty of the Wabash alone, appears still more clearly in the following language from the same page.

"This Wabash road, as a system, was in operation, a going concern, from one end to the other, as such discharging its duties as best it could to its various creditors. This Court, at the instance of the corporation, and to preserve the integrity of this system, took possession of it by its Receivers. It took possession of it as a going concern, and so far as is reasonable and practicable, it should continue it as a going concern until it surrenders it to whoever may be the purchasers or future holders of it."

All this is plain. The Court undertakes to continue the operation of the whole Wabash system for a double purpose: 1st, to fulfill *the duty of the Wabash to the public;* and 2d, to preserve the system as a going concern *for the benefit of the Wabash owners or creditors.*

What we say is, simply, that whatever expenses or losses were incurred in pursuing either or both of these two objects, is chargeable *alone upon the Wabash.*

It is true that the order of April 16, 1885, informed the lessor companies to which it applied, that their right to re-entry for breach of leases, or of the mortgage bondholders to foreclose, "will be promptly recognized;" but the Court with equal clearness announced that until such action was taken the Court would "continue to operate such subdivision."

The Court did not retain the property of the Quincy, Missouri and Pacific from April 16, 1885, to August 1, 1885, or direct its Receivers to do so, as mere caretakers, but actively and for the avowed purpose of seeing to it that the Wabash fulfilled its duty to the public, and that the Wabash system was kept "as an entirety" and "as a going concern." Rent is therefore due from the Receivers to these appellants upon the basis of the lease, from May 27, 1884, to August 1, 1885.

V.

The opinion of the Circuit Judge may be supposed to present the strongest views that are possible in maintenance of the judgment below; and his views should, therefore, receive special attention.

These views are found in the record (fols. 46–58); and it may be said shortly, that the opinion below cites no authority whatever, and is founded wholly on the assumption, that because the Receivers in this instance were appointed on the application of the mortgagor company—the Wabash—the usual result of their continuance to hold and use the leased property of the mortgagor, does not follow in this case.

Scrutinize this opinion as one may, nothing else is found in it. The Court expressly concedes, as has been already stated, the soundness of the ordinary rule which we have cited, namely, that "where a Receiver enters upon and occupies premises leased to a corporation over which he is appointed, he thereby becomes liable for the rent due under the lease," but holds that this rule is not applicable here, because the receivership here "was upon the application of the mortgagor, a party in possession of various properties--some owned, some leased, and all subject to various obligations."

In a word, the Court below here claims the right to appoint Receivers and direct them to hold and use property under a lease, and yet to exempt them from all liability for rents, leaving the lessor no remedy but his original claim under the lease against the insolvent corporation or debtor, all of whose property the Court has taken into its possession. It is probably enough to say in answer to all this, that no Court has ever yet been

finally allowed to treat debts and obligations assumed, or directed to be assumed, by Receivers, as anything but debts which the property in the hands of the Receivers must be held bound, at all times and to the last penny, to pay.

We have already presented our views upon the fundamental ground upon which the opinion of the Court below proceeds, namely, that this receivership was so peculiar and exceptional in its inception as to take it out of the rule prevailing heretofore in all cases of the appointment of Receivers. We have conceded fully the exceptional character and circumstances of the appointment of these Receivers; but we have urged that there is but one kind or class of Receivers after their appointment, and that however exceptional their appointment, their character and their liabilities are not exceptional after their appointment, but are governed by perfectly well settled and uniform rules of law.

VI.

The rent reserved by the lease is due from the time of the last payment by the Wabash, to wit, January 1, 1884—the entire period for which rent is due being thus one year and seven months, at $72,240 per year.

We have already considered the question of rent from May 29, 1884, the date of the Receiver's possession, to April 16, 1885, when the Court made the order already cited; and from April 16 to August 1, 1885, the date of

the surrender of the property by the Receivers. The only remaining period to be considered is the period which elapsed between the date of the last payment by the Wabash—January 1, 1884—and the date of the Receiver's possession, May 27, 1884.

We have heretofore seen that the bill of the Wabash Company, upon which the Receivers were appointed, specially represented that under the terms of the Wabash leases the lessor companies could declare forfeitures unless the rent was promptly paid when it accrued, and that unless some provision was made by which such rentals could be promptly met, the leases would be declared forfeited and be wholly lost. Another prayer of the complaint was that the Receivers be ordered "to raise money with which to pay *all rentals accrued or accruing.*" And the final prayer of the complaint was that the Court would order the Receivers, "after paying the current expenses, etc., and also after paying for all labor, supplies, *rentals* and services aforesaid, etc."

We have also seen that the order of appointment of the Receivers provided in terms for the payment by the Receivers of "*all rentals accrued or which may hereafter accrue* upon all leased lines of said complainant."

We again point to these facts as evidence of the original intention of the Wabash corporation, the Court and the Receivers of the Court, to pay the rent which had accrued as well as the rent which might thereafter accrue.

But we understand that the payment of accrued rent, especially where the quarter-day, or day of payment, has not arrived at the time when possession is taken by Receivers, is included among the items which are payable out of the Receivers' fund, under the authority of such cases as *Fosdick* vs. *Schall*, *Miltenberger* vs.

Logansport Railway Co., supra, Barton vs. *Barbour*, 104 U. S., 126.

Thus in *Fosdick* vs. *Schall*, the Court, referring to the fact that when railroad companies become embarrassed, it usually happens that debts for labor, supplies, equipment, and improvements, are left unpaid by the companies, says:

"Every railroad mortgagee (this was a case between mortgagees and other claimants) in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income." And, it certainly is not inequitable for the Court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as the condition of such an order that what is due from the earnings to the current debt shall be paid by the Court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the Court will do what, if a Receiver should not be appointed, the company ought itself to do." And throughout this decision, the Court proceeds upon principles which would amply cover the payment of accrued, as well as accruing, rent in the present case.

In *Ex parte* Faxon (*supra*), Judge Lowell said: "If he (the assignee) takes the lease, he makes himself liable, on behalf of the estate, for the rent, including at least the current quarter, and this he must consider in determining whether to adopt the lease."

Moreover, under the orders of the Court, the Receivers not only continued to pay accruing rent, but paid all accrued rent upon a large number of the leased Wabash branches, so that the only question which is peculiar to the Quincy, Missouri and Pacific is, whether the fact

that no net incomes were received from that road during its occupation by the Receivers, is an excuse for refusing to pay rent. It seems clear that if the lease was adopted by the Receivers, they took it *cum onere*; that is to say, with the liability to pay rent just as the company was liable to pay it under the lease, including accrued rent, of which the pay day had not arrived, as well as the rent accruing after the Receiver's possession.

VII.

If the rent reserved by the lease is due by the Receivers, the amount of unpaid taxes which accrued during the possession of the Receivers, as well as the cost of repairs, as provided for in the lease, is chargeable against the Receivers.

There would seem to be no doubt that if the lease be assumed or adopted, it is adopted as a whole, and in all its provisions, and the liability for rent is not different from the liability upon any other covenant in the lease.

The *Miltenberger* case is authority for the position that if a lease reserves rent, and likewise provides for compensation for deterioration of the leased property, and for other expenses, all such items are payable out of the Receivers' funds, or out of the proceeds of the sale of the *corpus*.

Miltenberger vs. *Logansport Railway Co.*, 106 U. S. 286; see especially p. 313.
See also *Ex parte Brown*, 15 So. Car., 518.
Douglas vs. *Cline*, 12 Bush., 609.
Cowdrey vs. *R'y Co.*, 93 U. S., 352.
Barton vs. *Barbour*, 104 U. S., 126.

VIII.

The rent, taxes and cost of repairs under the lease are payable by the Receivers as part of the operating expenses of the Wabash system.

It is not necessary to do more, in support of this conclusion, than to refer again to cases already cited, particularly the *Miltenberger* case, *Cowdrey* vs. *Railroad Co.*, *Fosdick* vs. *Schall*, and *Barton* vs. *Barbour*, *supra*.

But the case of *Turner* vs. *Railway Co.*, 8 Rep., 453, is so closely in point as to warrant special notice. This was a suit brought in the State Court of Indiana against a Receiver for rental of locomotives and for omission to make the proper repairs on them. The case was removed to the Federal Court, where it was heard and decided by Judge Drummond, who said:

"The rental was a claim against the Receiver, as such . . . and constitutes a just claim against him, and against the Court which was operating the road. . . . It was certainly just as much a part of operating expenses of the road as labor, or materials and supplies."

The Court in that case held that not only was the income liable, but also the proceeds of the sale of the property.

IX.

If the funds in the hands of the Receivers arising from the revenues of the Wabash system are insufficient, our present claims are a charge upon the Wabash property in the hands of the purchasers.

Turner vs. *Railway Co.* (*supra*).
Fosdick vs. *Schall* (*supra*).
Williams vs. *Railway Co.*, 33 Gratt., 624.
Miltenberger vs. *Logansport Railway Co.* (*supra*).
Woodruff vs. *Railway Co.* (*supra*).

Chief-Justice Waite says, in *Fosdick* vs. *Schall*, p. 254:

"While, ordinarily, this power (of Courts of equity to charge obligations upon the mortgaged property) is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way."

The Court below in its final decree in the Wabash case reserved to itself as a condition binding on the purchasers, that the Wabash property and the purchasers should remain liable for such claims as the present (fols. 254, 255). And the Court thereby retained jurisdiction for itself as well as for other Circuit Courts or other Courts, to "compel full payment of all the debts and liabilities of said Receivers, or upon intervening claims allowed or to be allowed, or upon any other claims or allowances that have been or may be charged against said property, or any part thereof, or said Re-

ceivers. . . . And such jurdisdiction shall continue until all the claims and demands that have been or may be allowed against said property, or any part therefor, or said Receivers, by order of said Courts, shall be fully paid and discharged. The provisions aforesaid shall apply to the purchasers at said sale and to all persons taking said property through or under them."

D. H. CHAMBERLAIN,
For Appellants.

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Supreme Court of the United States

OCTOBER TERM—1891.

TERM NO. 223.

THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY AND THEODORE GILMAN AND CHARLES H. BULL,

Appellants,

vs.

SOLON HUMPHREYS AND THOMAS E. TUTT, RECEIVERS OF THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

SUPPLEMENTARY AND REPLY BRIEF OF D. H. CHAMBERLAIN

FOR APPELLANTS.

Albert B. King, 89 William St., N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1891,

TERM NO. 223.

THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY, AND THEODORE GILMAN AND CHARLES H. BULL, Trustees, Appellants,

vs.

SOLON HUMPHREYS AND THOMAS E. TUTT, Receivers of the Wabash, St. Louis and Pacific Railway Company.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Supplementary and Reply Brief for Appellants.

It is desired in this brief, first, to call attention to a few cases not cited in the former brief for appellants; and next, to make brief reply to the main arguments of the appellees' counsel, as contained in his printed brief.

Union Railway vs. *Chicago, Pekin, &c., R'd*, 127 U. S., 200:

Here the Union Railway Company intervened to compel the receiver of the defendant company to pay rent for tracks and terminal facilities.

The intervenor owned certain tracks and terminal facilities, and required the receiver of the defendant company to enter into a contract on certain terms for their use. The receiver declined, and it was agreed to refer the matter to the Circuit Court as arbitrator. The judge declined to act, and the receiver was excluded from their use. The intervenor sought to compel payment of rent, according to the terms of the contract proposed.

In this case no contract of lease at a stipulated rental existed, and this Court held that the proffered contract was not a fair measure of value, and that the amount already paid by the receiver was sufficient.

Those would seem to be no doubt, under the reasoning in this case, that if a contract had existed, and had been adopted by the receiver, fixing a rental, the Court would have required payment according to the lease.

Thomas vs. *Peoria and R. I. R'y Co.*, 36 Fed. Rep., 808:

In this case the Circuit Court refused to allow leases to be enforced for rent of cars against a receiver, the leases having been made by a car company, which controlled the railroad company, before the appointment of the receiver.

The leases being held invalid, the receiver was held liable to pay only a reasonable rental.

Easton vs. *Houston & Tex. Cent. Ry.*, 38 Fed. Rep., 784:

In this case the intervenor, the Pullman Palace Car

Co., had a contract with the Houston & T. C. Ry., for drawing-room and sleeping cars. The railway passed into the hands of receiver, while the contract was running. The receiver, being aware of the contract, took possession of and used the cars in question, and the master reported that—

"The continued use by the receiver of said cars, under the circumstances, was in legal contemplation, an adoption by them of the contract, and rendered the defendant in this suit liable to the car company, under the above quoted terms of the contract, without regard to the condition of the cars when received by them."

The order appointing the receivers in this case contained the following paragraph:

"To take possession of the money and assets, real and personal, road-bed, road, iron, ties, lands, rights of way, rolling-stock, leases, franchises, and all other rights of property whatsoever of the Houston and Texas Central Railway Company, wherever the same may be found, with power to manage, control, and exercise all the franchises whatsoever of the said railway company * * * * and in the meantime and until another order of this Court be rendered, to run, operate and manage the railways of the said defendant railway company."

The Court upon this says:

"Here is authority—almost express authority—for the receivers to take possession of the lease between the intervenor and the railway company, and to run, operate and manage the cars furnished by the intervenor under the lease. Under this authority, the receivers, with full knowledge of the obligations of the railway company, and the condition of the property furnished thereunder, did take possession of the lease and leased property, and operate the same, enjoying all its advantages, and all for the benefit of the trust fund. It would seem that under this state of facts the receivers, fully authorized thereto, *became the assignees of the railway company, and thereby legally and equitably obligated themselves*

to perform the several covenants undertaken by the company as to the care and return of the leased property. The lease in question was an entirety; of necessity an assignment or assumption thereof was of the whole, and not of any particular part.

For adjudicated cases in point, see *Woodruff* vs. *Railroad Company*, 93 N. Y., 619; *Dorrance* vs. *Jones*, 27 Ala., 630; *Pugsley* vs. *Aikin*, 11 N. Y., 494; *Sutliff* vs. *Atwood*, 15 Ohio St., 186; and *People* vs. *Dudley*, 58 N. Y., 323. On rights, powers and duties of receivers in regard to contracts, see Beach, Rec., §§ 249, 257, 361, 363, and cases there cited."

Yerkes vs. *Sparhawk*, 142 U. S., 1:

This was a case of assignees under a voluntary assignment. Yerkes, the assignor, was the owner of seats in Stock Exchanges on which assessments were overdue. The assignees failed and declined to pay the assessments and they were paid by the assignor, whereupon the assignees claimed the seats as assets of the bankrupt's estate.

This Court held that while the assignees might have elected to assume the liability of the assignor's seats and paid the assessments, and thus been entitled to treat the seats as assets, yet not having so elected they could not claim them when the assessments had been paid by the assignor out of his personal funds; and on this the Court remarks:

"They (the assignees) were not bound to accept the property of an onerous and unprofitable nature, which would be a burden instead of benefiting the estate, and they could elect whether they would accept or not, after due consideration and within a reasonable time, while, if their judgment was unwisely exercised, the bankruptcy Court was open to the creditors to compel a different conclusion (*Glenny* vs. *Langdon*, 98 U. S., 20; *American File Co.* vs. *Garrett*, 110 U. S., 288.")

Sunflower Oil Co. vs. *Wilson*, 142 U. S., 313:

In this case an oil company contracted with a railway company to purchase certain rolling stock and lease it to the latter company. The railway company becoming insolvent, a receiver was appointed who continued to use the rolling stock. The oil company intervened to secure the carrying out of the contract. The Court held that the contract could not be enforced against the receiver, but that he was compellable to pay a fair compensation for the cars used.

The Court says:

"In the view we have taken of this case, it is unnecessary to consider whether the *manifestly illegal stipulations* in this contract had the effect of vitiating the entire agreement. It bears evidence on its face of having been extorted from the necessities of the railway company and contains many provisions which fail to commend it to the consideration of a Court of Equity" *p.* 325.

Again in this case the Court says, speaking expressly of the receivership of a railway company:

"The receiver did not, by virtue of his appointment, become liable on the covenants and agreements of the railway company (*Highon Receivers*, Sec. 273; *Hoyt* vs. *Stoddard*, 2 Allen, 242). Upon taking possession of the property, he was entitled to a reasonable time to elect whether he would adopt this contract and make it his own, or whether he would insist upon the inability of the company to pay, and return the property in good order and condition, *paying, of course, the stipulated rental for it so long as he used it*" (*Turner* vs. *Richardson*, 7 East., 335; *Commonwealth* vs *Franklin Ins. Co.*, 115 Mass., 278; *Sparhawk* vs. *Yerkes*, *ante* 1)."

Kneeland vs. *Am. Loan & Trust Co.*, 136 U. S., 98.

This case presents several aspects. So far as the case bears on our present case it will be enough to say that the

receiver was originally appointed under bills filed by a judgment creditor, the trustees of the mortgages being made defendants. This receivership was continued four months, whereupon bills were filed for foreclosure of the mortgages by the trustees, and a receiver was appointed upon these bills. Certain rolling stock had been purchased by the company prior to the receivership, the contracts of purchase being, in form, leases. This rolling stock had not been fully paid for, and by intervening petitions, the vendors sought to recover rent for this rolling stock. The receiver used the rolling stock during the four months in question.

In deciding this question, the Court lays it down, that "If at the instance of one who is rightfully entitled thereto, a Court should appoint a receiver of property, the same being railroad property, and, therefore, under an obligation to the public of continued operation, it, in the administration of such receivership, *might rightfully contract debts necessary for the operation of the road, either for labor, supplies or rentals, and make such expenses a prior lien on the property itself*" (p. 98).

It appears also in the case that the Court "never made any order for the rental of this rolling stock" (p. 99), and that rental was secured according to the contracts of sale to the intervening vendor by a lien on the rolling stock in question, and that the said rolling stock was afterwards returned to the intervenors. Under these circumstances the Court held that rental of the rolling stock could not be charged as a prior lien on the realty or other property of the railroad for the four months.

At a later period, the trustees began foreclosure proceedings, and at their instance a receiver was appointed, of *all the property* of the railroad company. This action of the trustees the Court regarded as a consent on their

part that the rental value of the rolling stock should be paid *in preference to their own claim.*

The Court also in determining the reasonable rental value held that it "was not to be determined by the amount of actual use, but by what, in the first instance, and before the use had been had, would be adjudged a reasonable rental value" (p. 103).

In this case, the so-called leases being in reality contracts of sale, and neither the Court by its order nor the receiver by his action having adopted these contracts of sale, but the rolling stock having been returned to the vendors, no question of the payment of *rental as fixed by the lease*, appears to have been raised or insisted on, by the intervenors, nor passed on by the Court.

The case is, however, express authority to the effect that when under his order of appointment as receiver, on the application of the trustees of a mortgage, the receiver takes possession and uses rolling stock held by the railroad company under conditional contracts of sale, "Rental for such rolling stock must be first paid, as one of the expenses of the receivership;" in other words, as an "operating expense" of the road under the receiver.

But there has been one decision in a case identical with the present case, as to all essential facts and features, by a Court of high authority—the case of *Brown* vs. *Toledo, P. & W. R. R. Co.*, 35 Fed. Rep., 444—and the opinion of the Court is such a plain, logical, irresistible presentation of the case, that nothing can be added or taken away from it as a complete judicial *résumé* of the facts and statement of the principles involved.

At folios 106 and 107 of the present record, it appears that the Toledo, P. & W. R. R. was one of the leased lines of the Wabash when the receivers were appointed,

as well as one of the lines charged with inability to earn its operating expenses.

The trustees of its mortgage intervened, as here, to demand the stipulated rental while it was held by the receivers, and the Circuit Court of the Seventh Circuit rendered the following decision :

"1. The Wabash Company had a leasehold interest, and no more, in the property of the Toledo, Peoria & Western Railroad, and by the terms of the lease that interest was liable to be forfeited for the non-payment of rent. The Wabash Company agreed to pay as part of the rent the interest, as it became due, upon the first mortgage bonds of the Toledo, Peoria & Western. The mortgage which the Wabash Company executed, and which was foreclosed, bound the leasehold interest in the Toledo, Peoria & Western property, and nothing more. The relations between the Wabash and the Toledo, Peoria & Western at the time Humphreys and Tutt were appointed receivers, were those of lessor and lessee ; and the receivers, under the orders of the Court, were invested with the entire estate of the Wabash Company, including its leasehold interest in the Toledo, Peoria & Western property. The receivers thus became assignees of the lease, and, as such, liable for the rent.

2. The Wabash suit was commenced to preserve intact the Wabash system for the benefit of that company and its creditors and stockholders. In order to do this, it was necessary to prevent the forfeiture of leases, including that of the Toledo, Peoria & Western ; and the action of the Court, including the appointment of the receivers, plainly indicated that the rent would be paid upon leased lines. At the time the latter suit was commenced, neither rent under the lease of the Toledo, Peoria & Western, nor interest on its first mortgage bonds, was in arrear ; and therefore neither the Toledo, Peoria & Western, nor the trustees in its first mortgage, had any right to demand possession of the leased property. It was at all times in the power of the Court which appointed the receivers to direct them to surrender possession of the leased property.

3. The receivership embraced only the property of the Wabash Company, and the Court took possession of the property of the Toledo, Peoria & Western, not for the benefit of that company and its creditors, but for the benefit of the Wabash Company and its creditors and stockholders. No part of the expenses of the receivership can, therefore, be properly chargeable against the Toledo, Peoria & Western property.

4. The Toledo, Peoria & Western property was operated by the receivers from May 28, 1884, to June 10, 1885, and the rent which accrued during that period, applicable to the payment of interest on the first mortgage bonds, amounted to $321,080.47, which amount is due from the receivers to the trustees in the first Toledo, Peoria & Western mortgage, less $99.571.17, already paid by the receivers on that account.

5. The right of this Court to decree upon the claim of the trustees in the first mortgage of the Toledo, Peoria & Western for rent for the use of the leased property during the time it was in the possession of Humphreys and Tutt, as receivers, is provided for, and recognized in the orders and decrees of the Court in the Wabash suit at St. Louis.

A decree will, therefore, be entered against the receivers for the rent which accrued during their possession of the leased property, less $99,571.17, the amount already paid as stated, which amount so decreed to be due, shall be made a charge upon the property of the receivership, as part of the receivership expenses."

It is due to entire fairness that it be stated here that the judgment in the last cited case was subsequently set aside, but solely on the ground that the proper parties were not all before the Court—with leave to intervenors to renew the application on amended papers.

Brief for Appellees.

I.

The brief of counsel for the appellees gives some space to combatting the position that the Wabash receivers took the lease and leasehold property in question *as assignees*.

It is proper to remind the Court that the appellants' brief does not assert that the receivers took as assignees. Their position is thus stated upon this point:

"The receivers *having taken possession of and operated* the railroad of the Quincy, Missouri and Pacific from May 27, 1884, to August 1, 1885, must be held to have *adopted the lease* under which said railroad was held at the time of their appointment, and to have made themselves and the property in their hands liable to the lessor company according to the terms of such lease." (Appellants' brief, p. 7).

It is true that many of the cases speak, as does *High on Receivers*, Sec. 273, of the receiver as taking, under such circumstances, *as an assignee of the lease*. This Court cites the section in question from High, in support of its position in *Sunflower Oil Co.* vs. *Wilson*, that the receiver might have "*adopted the lease and made it his own*," or might have declined to do so and "*returned the property, in good order and condition*, PAYING, OF COURSE, THE STIPULATED RENTAL FOR IT SO LONG AS HE USED IT."

And in numerous other cases cited on appellants' former briefs, notably *Easton* vs. *Houston & T. C. Ry.*, the receiver who adopts a lease or contract is spoken of *as an assignee* of the lease or contract.

The question is a highly technical one—whether a receiver has a *title* to property as receiver—whether he has

an estate or not in the property he holds and manages—but it is a question which does not call for discussion here and does not affect the questions here involved. It seems to be undisputed that, as was said by this Court, in *Sunflower Oil Co.* vs. *Wilson*, a receiver may, by taking possession of property leased to the company of whose property he is appointed receiver, "adopt the lease and make it his own;" and that if he does so "adopt it and make it his own," he thereby becomes liable for "the payment of the stipulated rental so long as he uses it," as was again said by this Court in the same case. These positions cover our entire present claim. How the receivers took—whether as common law assignees, as *quasi* assignees, or as equitable assignees—whether the *title* to the property held by them, was, in the technical sense, in them—or whether the estate, or the whole estate, vested in them—or whether they were mere custodians, the arm of the Court—all these are inquiries more abstruse than important.

The doctrine, however, that a receiver by taking possession of leased property may, by unequivocal acts of use and control of such property, adopt the lease and become bound by its terms, cannot be assailed or disturbed at this day.

Our contention simply is, that these receivers, by taking, holding, using and enjoying this leased property of the Quincy road, without offering to return the property, and without seeking to modify the terms of the lease "adopted" the lease and "made it their own"; and hence must "pay the stipulated rental so long as they used it."

The only debatable question is, Was there anything in this case which saved them from their usual liability?

The appellees' brief urges in a variety of forms and

with great ingenuity, that in all cases in which receivers have been required to pay the rent stipulated in the lease, "it has been for the use of something outside the estate which the Court has undertaken to administer" (Appellees' brief, p. 26).

It is not quite clear what is meant by this language—"something outside the estate which the Court has undertaken to administer." Let us test it. Suppose, in the present case, the receivers had been appointed at the instance of the trustees of the general mortgage—a mortgage which expressly covered the leasehold interests of the Wabash Company in its leased roads. Suppose the Court had directed the receivers in such case, to take and hold all leased roads. Does counsel mean to say that, under such circumstances, if the receivers took, held and operated the leased lines, they would take "something *outside the estate* which the Court had undertaken to administer."

In such a case, he will readily admit, we suppose, that the receivers would be required to pay "the stipulated rent"; and it would therefore seem, that a case had been found in which receivers were required to pay "stipulated rent" for something which was *clearly a part of the estate which the Court had undertaken to administer;* for, in the case supposed, the leased lines or the leasehold interests in those lines are a part of the mortgaged estate.

Counsel is, therefore, mistaken; his test fails; for in a case which might arise at any time,—the very case which did arise in *Woodruff* vs. *Erie Ry.*, 93 N. Y., 609, as we shall presently show,—the receiver would be required to pay "stipulated rent" on property which was part and parcel of the estate to be preserved and administered.

The Erie Railway Case:

This case is in all respects so high an authority, as well as so apposite to the present discussion, that it may well be carefully examined. Counsel for the appellees asserts (brief, p. 60), that the leased line there in question—the Erie & Genesee Valley Railroad—"was no part of the mortgaged estate." If this assertion were correct, counsel would have found a case in which rent was allowed on "something outside." But the counsel's assertion is not correct.

The facts of that case were these: The receiver was originally appointed in a suit by the People to dissolve the corporation and distribute its assets, May 25, 1875. Shortly afterwards, the Farmers' Loan and Trust Co., under its foreclosure suit, and the trustees of another mortgage under their foreclosure suit obtained orders "extending" the receivers' authority over the property covered by these mortgages. The Farmers' Loan and Trust Co.'s suit proceeded to judgment of foreclosure and sale, dated Nov. 7, 1877. By this decree it was found that the leasehold interests of the Erie Railway were covered by the mortgage, and in enumerating these leasehold intesests the Referee appointed to sell, enumerates the "Lease of the Erie & Genesee Valley R. R., by L. C. Woodruff, lessee, dated November 8, 1871."

The decree further contained a provision permitting the plaintiff at the sale to abandon and disclaim "any leasehold estate or interests embraced and included in the mortgage, not deemed valuable," by giving notice to that effect to the Referee. Pursuant to such notice, the Referee withdrew from sale, and so reported to the Court, "a lease or memorandum of agreement bearing date the 8th day of November, 1871, to which the Erie Railway Company is party of the first part, and Lauren

C. Woodruff, lessee of the Erie and Genessee Valley Railroad Company is party of the second part."

This case is one, therefore, in which *the leased property or railway on which stipulated rent was ordered to be paid* by the receiver, regardless of the question of its value to the lessor company or to the receiver, was not "*something outside the estate administered by the Court,*" but was part and parcel of it.

What is true of this case, must be true of all cases where leasehold interests are a part of the mortgaged property. The receiver ordinarily and regularly takes such leasehold interests, and if he finds them valuable, he adopts them and pays the rent reserved in the leases; if he finds them of no value, he declines to continue the leases and returns the property, or obtains a modification of the terms of the leases.

So clear is this duty and practice of receivers, that it is laid down by the authorities on the law of Receivers, that a receiver may do all this *without an order of Court.*

Beach on Receivers, Sec. 514.

II.

The other chief contention of the counsel for appellees is more difficult to state, as well as to understand and appreciate; but it is in substance, as we understand it, this: That the receivers in the present case, though appointed on the sole motion of the Wabash Company, and without the knowledge of the Quincy Company, were nevertheless appointed to preserve the property not merely of the Wabash Company but of the Quincy Company as well, and for the benefit of the Quincy

Company as well as of the Wabash Company; and hence that the Quincy Company must share the expenses of the receivership, at least to the extent of losing all claim for rent under the lease.

Appellees' counsel in his brief declares that "the material errors of appellants's counsel consist in his denying that the Quincy line constituted a portion of the receivership property" (*p.* 26). Again, he says, "We (appellees) contend that the Wabash receivership was established because it appeared to the Court from the allegations of the bill of complaint, that *the financial condition of the Quincy Company*, as well as the other defendants, *would be improved by keeping all the railroads and rolling stock previously in possession of the Wabash Company together*" (*p.* 28).

In other words, if we may undertake to paraphrase so remarkable a proposition, the Wabash Company being insolvent, was able to frame a bill by which the Court was warranted in putting the property of the Quincy Company, a perfectly solvent corporation then and always, seeking no aid of the Court, not even knowing of the effort of the Wabash Company and the Court to aid her—in the hands of receivers, and as the price and consequence of such aid, depriving her of all rent for the period of fourteen months, and thus pecuniarily mulcting her to the amount of $145,000!

And how has such a proposition come to be put forth and doggedly maintained?

Conceding, and dismissing without further remark, the fact of the anomalous origin of the Wabash receivership—its creation at the sole instance of the debtor company, before default on any of its obligations, and without notice to creditors,—we must look at the origin of the proceeding to see if it is possible that even such

a proceeding furnishes the grounds for maintaining the theory, either (1) that the receivers were appointed for the benefit of the Quincy Company; or (2), that being so appointed, and having taken and held the property of the Quincy Company, they were excused from paying any rent, and must go quit of all claim.

Appellees' counsel says: "It appeared from the allegations of the bill of complaint, that the financial condition of the Quincy Company would be improved by keeping it a part of the Wabash system."

This is a statement of fact, and can only be verified by examination. The bill of complaint appears *in extenso* in the record (fols. 67–88), and if it contains any allegations to the effect that "*the financial condition of the Quincy Company* would be improved by keeping it a part of the Wabash system," such allegations can be pointed out. We say that it contains no such allegations, in terms or in substance.

The bill contains repeated allegations that the Wabash Company is dependent, and those interested in the property of the Wabash Company, are dependent, for its value on the continuance of *the unity of the system.* No allegations are made on behalf of any interest *except the Wabash Company and those interested as creditors in the Wabash Company.*

The bill does not deprecate the breaking up of the Wabash system *as an injury to the lessor companies.* Thus (*fol.* 77), the bill avers that the leasehold interests are "very valuable *to the orator*" (the Wabash Company), and avers that unless *rentals are "promptly met*, your orator's leasehold interests, or some of them, of great value, will be declared forfeited and wholly lost *to orator, and orator's lines and power of earning money will be thereby very seriously affected.*"

Certainly, this is not an averment that the financial condition of the Quincy Company, or of any other lessor

company, will be injured by the disruption of the system. It is rather an averment that the Quincy Company stands ready to forfeit the lease and reclaim its property, and that *this will result in injury to orator's* (the Wabash) *lines and power of earning money.*"

And how does the bill of complaint propose to avert this injury? By seizing the lessor companies' property and holding it without paying rent, as has been actually done and as is now defended? Such an idea had not yet been conceived.

The bill of complaint over and over recognized the right of the lessor companies to receive their stipulated rent *as an absolute condition of their remaining in the system.* and it proposed, in terms, that "*such orders be made as would enable such receiver or receivers to raise money with which to pay all rentals accrued or accruing*" (*fol.* 82.) That was, from beginning to end, the theory of the bill of complaint, viz.: that *in order to preserve the unity of the Wabash system the rentals of its leased lines must be paid* according to the terms of the leases.

How different is all this from the theory now advanced, viz.: that the unity of the system was to be preserved for the benefit of the Quincy Company and the other lessor companies; and that whether rent was paid or not must depend upon whether the leased roads earned it or not!

The Court, too, at that time took this view of the purpose of the bill of complaint, and in the order appointing receivers, the Court recites that the bill of complaint has "shown the Court that there is great danger of loss, waste and destruction of *the property of complainant* or valuable parts thereof, unless such receiver or receivers be appointed" (*fol.* 89).

Here the injury is stated as threatened to the Wabash

property alone, *not to that of the Quincy Company or other lessor companies.*

And the Court proceeds (*fol.* 90) to direct the receivers to "PAY ALL RENTALS ACCRUED OR WHICH MAY HEREAFTER ACCRUE UPON ALL LEASED LINES OF SAID COMPLAINANT."

Why direct payment of rentals accrued and accruing, if the allegations of the bill showed that "the financial condition of the Quincy Company would be improved by keeping it as part of the Wabash system," irrespective of payment of rent, as counsel for appellees now contends?

We say, then (1) that in point of fact, the bill of complaint did not aver that the Quincy Company would be benefited by the receivership; (2) that the Court acted upon no such idea in appointing the receivers; (3) that the theory of the bill was that rent must be paid in order to preserve the unity of the system; (4) that the Court acted on this theory and directed both present and future rent to be paid.

Not only is such the *fact*, but if it were not the fact, and if the bill of complaint had stated, in terms, that "the financial condition of the Quincy Company would be improved" by holding its road in the Wabash system, and if the Court had placed it in the hands of receivers upon such an allegation of the bill of complaint, such action of the Court would have been wholly without legal justification and could not have cut off any right of the Quincy Company to payment of rent by the receivers while so held.

It is of extreme importance to keep in mind that the only connection of the Quincy and Wabash Companies was as lessor and lessee; that the only interest the Wabash Company had or could represent in its bill of complaint, and the only interest with which *the Court*

could deal upon the allegations of the Wabash Company, was *the leasehold interest* created by the lease. Beyond this, the Court could, by no right, or lawful warrant, on the suggestion of the Wabash Company, deal with the interests or property of the Quincy Company. This leasehold interest of the Wabash in the Quincy Company was an asset, an item of property, belonging to the Wabash Company. As an asset of the Wabash Company it could be seized and dealt with by the Court upon a proper showing.

What was the measure of this asset? It was the right of possession, use and enjoyment of the Quincy railroad on certain expressed conditions, principal of which was *the payment of stipulated rent.* This was the full measure of this asset. It involved no ownership, had no incident of absolute property, but was merely a right to use, conditioned on payment of rent to a specified amount, in a specified manner.

Could the Court change this asset, or increase its extent, or alter or set aside the condition of its origin and existence? Plainly not. The lease was the voluntary act of the parties, and it fixed absolutely the measure of the leasehold interest.

All that a Court could do was to deal with this property interest *as it was created by the parties and as it still existed.* It could seize it and place it in the hands of receivers, but it would remain in the hands of receivers, of the same extent, no greater and no less, as it was before the Court dealt with it. *The condition of payment of rent could not be dissevered from it.* If rent was not paid, it ceased, at the will of the Quincy Company, to be a part of the property of the Wabash Company. The Court and its receivers had but three lawful choices: (1) either to pay rent and hold the leased property; (2) to refuse to pay rent and relinquish the property, or (3) to seek and obtain a change of terms with the lessor.

The Court, however, according to the argument now advanced, did neither of these things, but seized upon this Wabash asset and held it for the benefit of *the Quincy Company*, and, no profit being made in its operation, refused to pay any rent, stipulated or otherwise. We say simply that, without the assent or acquiescence of the Quincy Company, the Court had no power to do this. Its attempt to do so was contrary to law and ineffective to bar any rights of these intervenors.

The Quincy road went into the hands of the receivers as part of the property—a leasehold interest—of the Wabash Company, bound for the payment of fixed rent, and liable to be lost and forfeited if rent was not paid. NO BILL OF COMPLAINT OF THE WABASH COMPANY, AND NO ACTION OF ANY COURT, COULD CHANGE THESE RELATIONS AND CONDITIONS.

We have already set forth the reasons which lead us to say that the Court could not have intended to deal with the Quincy property, except under the conditions of the lease; but it is necessary to add that, *if the Court had intended to do otherwise*, it had no legal power to vary the relations created by the acts of the parties themselves; and we add here, that we know of no case in which any Court of final resort has held that, when a receiver adopts a lease, and the lessor insists on the rent stipulated in the lease, the Court has the power or right to refuse it. Certainly, we have found no such case, and the counsel for appellees has cited none.

III.

Counsel for appellees says: "If intervenors did not approve of the allegations in the bill, to the effect that

it was better *for their line* that all the roads that had been brought together by the Wabash Company should remain together, why did they not, as parties to the suit, make their views and wishes known to the Court in some proper manner?" (p. 52).

Again denying that the bill contained allegations to the effect here stated, we say in reply that the situation during all the time from May 27, 1884, the date of the appointment of the receivers, to August 1, 1885, the date of the surrender of the Quincy line by the receivers, was one with which the Quincy Company might well be satisfied, and for these reasons: (1) The line had been put into the receivers' hands at the request of the Wabash Company, which had alleged that it was essential to the Wabash's "lines and earning power" (Record, fol. 77) that the lease should be saved from "forfeiture" by the action of the Quincy Company, the Wabash Company further asking the Court "to make such orders as would enable such receiver or receivers to raise money to pay all rentals accrued or accruing" (Record, fol. 82). (2) The Court, moved by these representations, had, in terms, directed the receivers "to pay all rental accrued, or which may hereafter accrue, on all leased lines of said complainant" (Record, fol. 90).

If the lease was an advantageous one, in the first instance, to the Quincy Company, why should the company have sought to retake its road or terminate the lease *when the Court, in the most express terms, had assured the payment of the rental?* Ordinarily, no better security can be found for the payment of money than the promise of a Court expressed in a public formal order to receivers. Whatever property the Court has in its custody is ordinarily understood to stand *pledged to redeem such a promise, in preference to all other claims.*

And here we may as well notice again the claim of appellees and of the Court below, that the orders of the Court from time to time had given the appellants notice that no rent would be paid.

Our answer to this is, that in the face of the solemn and express direction to the receivers to pay *all rentals*, in the order of May 27, 1884—an order never yet revoked or qualified—*nothing could suffice to warrant distrust in the certainty of the payment of rent, certainly its ultimate payment, except an equally express repudiation or cancellation of the lease and the surrender, or tender back, of the leased property.*

Such a cancellation of the lease or tender back of the property has never taken place. The property was held, appropriated, used and enjoyed, *under the lease*, till August 1, 1885.

By way of retort to appellees' counsel, we might ask why, if the Court or the receivers, or the Wabash party, wished to stop rent or extinguish all claim for rent, did they not give notice to the Quincy Company that they would no longer adopt the lease, and tender back the property? It would have been a simple, as well as an unmistakable, thing to do.

IV.

To the suggestion which crops out, here and there, to the purport that the Court was, by its receivers in this case, operating the Quincy road in order to discharge the duty of that railroad *to the public*, it seems sufficient to observe that whatever be the nature or extent of the power of Courts under certain conditions and circumstances to operate railroads *for the public*, and we are

not disposed to question such power; it certainly cannot be done by a Court when the railroad company itself has shown no unwillingness or inability to perform its public duties without extrinsic aid. The Quincy Company was not insolvent; it had neither admitted its insolvency nor had anyone else asserted its insolvency.

In fact, this suggestion is one of those measureless assumptions in which this case has abounded, and in which appellees' counsel shows inexhaustible invention. How could the Court operate the Quincy line in discharge of the Quincy Company's public duty till it had in some way learned that this duty was or would be neglected by the Quincy Company? It could not, and it is idle to waste words on such a point.

The only *public duty* the Court could concern itself with was the public duty of the Wabash Company, for by taking the Quincy line under its lease, the Wabash Company had undertaken to operate the Quincy line and discharge all its duties as a railroad. When the Wabash Company fell into the hands of receivers, the Court could discharge the public duties of the Wabash Company, if need be, at the expense of the Wabash property, but the Court had no more right to assume that the Quincy line was neglecting its public duties, or to charge the expense of operating it for the public on the Quincy line, than it would have had to do the same to any other solvent corporation wholly unconnected with the Wabash Company.

V.

On pages 44 and 45 of his brief, counsel for appellees thinks to convict us of self-contradiction by pointing out

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JAMES H. McKENNEY.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM NO. 223.

THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY AND THEODORE GILMAN AND CHARLES H. BULL, TRUSTEES, APPELLANTS,

vs.

SOLON HUMPHREYS AND THOMAS E. TUTT, RECEIVERS OF THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT AND BRIEF FOR APPELLEES.

WELLS H. BLODGETT,
Attorney.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

Term No. 223.

THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY AND THEODORE GILMAN AND CHARLES H. BULL, Trustees, *Appellants.*

vs.

SOLON HUMPHREYS AND THOMAS E. TUTT, Receivers of the Wabash, St. Louis and Pacific Railway Company.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

STATEMENT.

This proceeding was instituted to recover from Humphreys and Tutt, receivers of all the railroads and property of the Wabash, St. Louis and Pacific Railway Company, a rental which accrued under a lease made in 1879 by the Quincy, Missouri and Pacific Railroad Company to the Wabash Railway Company.

Briefly stated, the material facts necessary to determine the liability of the receivers, are as follows:

In 1879 the Quincy, Missouri and Pacific Railroad Company owned a railroad extending from West Quincy, Missouri, in a westerly direction across said State, and in Au-

gust of that year the Quincy Company leased its property to the Wabash Railway Company for a term of ninety-nine years, the Wabash Railway Company agreeing to keep the road in repair, pay all taxes thereon, and also pay, as a rental, a given percentage of its gross earnings, such percentage to be applied by the Wabash Railway Company directly to the payment of interest on certain mortgage bonds of the Quincy Company, which were to be issued at the rate of nine thousand dollars per mile for each mile of completed road, and if the percentage of earnings applicable to that purpose should not be in any year sufficient to pay said interest, then the Wabash Railway Company agreed to supply from its own funds the deficiency.

The lease provided (record p. 14) that in case the Wabash Company should fail to pay the interest on the bonds of the Quincy Company, and if for that reason the principal of said bonds should become due, the Quincy Company might in that event forfeit the lease and re-enter without process of law.

Under that agreement the mortgage bonds of the Quincy Company, to the extent of $1,204,000, bearing interest at the rate of six per cent per annum were issued, and thereupon the interest on those bonds became the minimum rental which the Wabash Company was required to pay under its lease. The Wabash Railway Company afterwards became, by consolidation, the Wabash, St. Louis and Pacific Railway Company, and

the latter company operated the leased line and paid the rental until 1884.

In May, 1884, the Wabash, St. Louis and Pacific Railway Company became insolvent and filed its bill of complaint in the Circuit Court of the United States for the Eastern District of Missouri, praying for the appointment of receivers to take possession of and operate all its lines of railroad for the benefit of all its creditors according to their respective legal and equitable rights and the appellants, as well as all the other lessors, trustees and parties interested in the other lines of the Wabash system, were made defendants.

The bill stated, among other things, (p.45, printed Rec.) that in maintaining and operating its railroad, the Wabash Company had contracted a floating indebtedness of $4,784,000.01. The bill also contained the following averments:

"Your orator would further show, that by the terms of nearly all, if not quite all, the mortgages and trust deeds aforesaid, whether executed by orator or by other companies on any portions of said lines prior to the time when orator acquired the same, there was not only embraced the roads and tangible property of the companies executing said instruments, but also the revenues and incomes to be derived from the use of the parts of said roads so mortgaged, and the holders of the bonds secured by said mortgages have always insisted upon their rights to look to the revenues of the sections of the road upon which the mortgages rested as a means of paying and discharging said bonds. That all or nearly all of said mortgages embraced all rolling stock to be thereafter acquired by the company executing such mortgages, but

as such original companies and those lines of railroad have been gradually absorbed in orator's vast system, the rolling stock on said entire system has become so intermingled as to be incapable of division according to the original ownership of the said several lines of road, or according to said several mortgages, and any attempt to control or dispose of portions of such rolling stock by any court or courts not having jurisdiction of the whole, and not competent to deal with orator's entire property as a unit, would produce great confusion and uncertainty, and would result in great loss to all persons interested in said rolling stock or in orator's property or securities.

Further complaining, your orator would show to your Honors that the directors and officers of your orator's company have thoroughly considered and already resorted to all proper means for obtaining the means with which to pay the floating indebtedness of said company, and also to meet the large amounts of accruing interest which will fall due at the beginning of the month of June next, and continue to mature by installments at very short intervals; but, may it please your Honors, so it is that said officers and directors have hitherto wholly failed to provide the means with which to discharge said floating indebtedness and to meet said accruing interest. That your orator is powerless now to accomplish such purpose, and for the time being, at least, is practically insolvent; that in spite of all the exertions of orator and its officers, it is now certain that a default in the payment of interest maturing in June next will occur, and that orator will also be without means of meeting its floating indebtedness. * * * * * * *

And orator avers that the interest of orator in said road, and of all its creditors and holders of the bonds aforesaid are greatly imperiled by the existing prospect of the disruption of said road on the happening of the default impending as aforesaid, and the interest of all parties can only be protected by the interposition of a court of chancery; that if said lines of railroad are

broken up, as aforesaid, and the fragments thereof placed in the hands of various receivers, and the rolling stock, materials and supplies seized and scattered abroad in the manner above indicated, the result will produce irreparable injury and damage, not merely to orator, but to all persons having any interest in said lines of road and the securities thereof. * * * * * *

And your orator further showeth unto your Honors that your orator and its Board of Directors, conceiving that it was their duty to protect said property and to treat the same as a trust fund for the security first of its creditors and then of orator's stockholders, have determined to appeal to your Honors sitting in chancery, to take possession of said lines of road through the instrumentality of one or more receivers, and thereby to prevent the breaking up of said lines of road and the scattering abroad of its assets in the manner above indicated. * * * * *

Inasmuch as orator has not an adequate remedy at law in the premises, it prays your Honors to take cognizance of this bill of complaint; that in order to the preservation of the interests of large numbers of persons, stockholders and creditors unknown to orator, and in order to the protection of the interests of all concerned, and to prevent a great multiplicity of suits, your Honors will appoint one or more receivers, and empower and direct such receiver or receivers to take possession of said entire property, and to preserve, operate and manage and control the same, collect all indebtedness due or to become due to orator, and otherwise to discharge all the duties ordinarily imposed by courts of equity on the receivers of railroad property by such courts appointed. * * * * * *

That your Honors will order and direct said receivers, after paying the current expenses of operating and maintaining said railroads, and also paying for all labor, supplies, rentals and services, aforesaid, * * * * * * * to apply the residue or surplus of all incomes, revenues and earnings of said railroads,

and all other assets coming into their hands as such receivers to the discharge of all debts, obligations and liabilities of orator, according to the rights and legal and equitable priorities of all concerned as creditors or otherwise, under the direction of the court. * * * *

And orator prays your Honors to make such order in the premises as will insure the protection of the interests of orator and its creditors, giving an opportunity to all the defendants not served with notice to be heard hereafter; and orator avers that no injury can arise to any creditor or person in interest from the appointment of the said receivers with or without notice, as such receivers' possession will inure to the benefit of all the persons concerned."

On the foregoing bill of complaint the Court, on the 27th day of May, 1884, appointed Solon Humphreys and Thomas E. Tutt receivers, and directed them to take possession of and operate all said roads, and from the revenues thereof pay all their current operating expenses, all just claims and accounts for labor, supplies, professional services, salaries of officers and employes, that had been earned or that had matured within six months prior to the making of said order, and all balances due to other railroad or transportation companies growing out of the exchange of traffic during the preceding six months. The order also contained a clause as follows:

"That said receivers also, in like manner, pay all rental accrued or which may hereafter accrue upon all leased lines of said complainant, and for the use of all terminals or track facilities, and all such rentals or installments as may fall due from said complainant for the use of any portion of road or roads, or terminal facilities of any other company or companies, and also

for all rentals due or to become due upon rolling stock heretofore sold to complainant and partially paid for."

On the 26th day of June, 1884 (within one month after their appointment), the receivers made a report to the court, (Record p. 56,) in which they set forth the terms of the lease under which the Wabash Company had acquired the Quincy Line, and stated that to the best of their information the earnings of said line had never been sufficient to pay its operating expenses, the cost of its maintenance and interest on the bonds which the Wabash Company had contracted to pay as a rental, and therefore the receivers asked the advice of the Court with respect to how they should keep the accounts of the earnings and of the operating expenses of said line.

On the 28th day of June, 1884, the Court made an order (Record p. 65,) in which it directed the receivers to keep the accounts of all the earnings and incomes from, as well as of all the operating expenses, cost of maintenance and taxes on said line, separately, and that they make quarterly reports to the Court, showing not only the income and xpenses of said line, but also the methods by which said income and expenses were ascertained.

Under that order the receivers made reports from which it appeared that the earnings of the line were never sufficient to pay its operating expenses, and that, without including any charge for rental, they had expended in operating the line, during the first year, $20,550 81 more than its earnings.

In October, 1884, the receivers asked the Court for instructions with respect to the payment of interest or rental on a certain other branch line of the Wabash system, known as the "Havana Division," and in passing upon that matter the Court, among other things, then said:

"I stated at an early day, and Judge Brewer has gone over the matter and we are in accord with regard to it, that I am not going to take the money that belongs to the underlying mortgages to pay interest on non-paying branches. If they have got to fail they must fail. I will protect the underlying mortgages especially, and they have not got enough here to do it. * * * If this branch is earning enough to pay its own interest, that is another inquiry; but certainly I am not going to sit here and order that the earnings that belong to other branches in the consolidated system shall be taken to pay concerns that do not earn running expenses. Let them collapse."

On the 20th day of March, 1885, the receivers made another application to the Court with respect to the future operation of the Quincy Line. In that application they stated, that since their appointment a number of the branch lines of the Wabash system had failed to earn their operating expenses, and they showed that from May 29 to November 30, 1884, the operating expenses of the Quincy Line had exceeded its earnings by the sum of $10,204.93, and they prayed the Court to make some proper order with respect to the future operation of said line and the payment of the rental which the Wabash Company had contracted to pay as lessee thereof.

On the 16th day of April, 1885, after all parties to the suit had been duly notified of the foregoing application, the Court entered an order with respect to the several matters brought before it. In that order the Court instructed the receivers as follows:

"3d. Where a subdivision earns no surplus, simply pays operating expenses, no rent or subdivisional interest will be paid. If the lessor or the subdivisional mortgagee desires possession or foreclosure he may proceed at once to assert his rights. While the court will continue to operate such subdivision until some application be made, yet the right of a lessor or mortgagee whose rent or interest is unpaid to insist upon possession or foreclosure will be promptly recognized. That, it is true, may work a disruption of the system, as evidenced by the movement just made in respect to this Cairo Division, but the proceeding for disruption will come from the subdivision. The Court is not sloughing off branches, tearing the system in two, but the disruption, if it comes, will come from those who seek separation and have legal right to do so."

Afterwards, on the 15th day of July, 1885, the Court, on the application of Gilman and Bull, trustees in the Quincy mortgage, made an order directing Humphreys and Tutt, receivers, to surrender the Quincy Line to said trustees, and in obedience to that order the receivers surrendered the property to Gilman and Bull on the 1st day of August, 1885.

On the foregoing facts Gilman and Bull, as trustees in the Quincy mortgage, and the Quincy, Missouri & Pacific Company, as lessor, intervened in the Wabash case, and claimed that out of the funds in the hands of Humphreys and Tutt, receivers, they were entitled to be paid

the full rental due under the lease made in 1879 by the Quincy Company to the Wabash, and they prayed *that their claim for rental be decreed a lien superior and paramount to all mortgages on all the property of the Wabash, St. Louis & Pacific Railway Company.*

The special master reported against the claim. Appellants filed exceptions to the report; the exceptions were overruled, and the Court entered a decree dismissing their petition.

POINTS.

1st. It was properly held in the court below that Humphreys and Tutt, receivers, did not under the order of their appointment take the leasehold term of the Wabash Company in the Quincy Road *as assignees.* As neither privity of legal estate nor privity of contract existed between the receivers and the lessor, the receivers were under no legal obligation to perform any of the covenants of the lease.

2nd. It was properly held that there was nothing in the orders of the Court below, or in the conduct of the receivers, which rendered either the Court or the receivers responsible for the rental due appellants under the lease to the Wabash company.

3rd. It was properly held that this was not a case in which parties who could take as assignees, *if they should so elect*, entered upon and occupied leased premises for

the purpose of determining whether they would accept or reject a lease.

4th. It was properly held in the court below that the claim of the Quincy Company for rental was not a lien superior in equity to mortgages on all the railroads and properties of which the receivers took possession.

5th. Intervenors were not entitled to recover on the authorities cited by them, because the essential facts in this case are not like those in the cases relied on.

BRIEF.

I.

It was properly held in the court below that Humphreys and Tutt, receivers, did not under the order of their appointment take the leasehold term of the Wabash Company in the Quincy Road as assignees. As neither privity of legal estate nor privity of contract existed between the receivers and the lessor, the receivers were under no legal obligations to perform any of the covenants of the lease.

Appellants have quoted from a large number of adjudged cases, all of which may have been properly decided, and none of which, it will be found on examination, are in actual conflict with what was held in this case by the court below.

Upon examination, it will be found that all the authorities cited by appellants in support of the contention that the receivers in this case *took as assignees*, are cases in which the courts have determined the liability of statutory receivers and assignees in bankruptcy who, when they were appointed, took by operation of law *the legal estate* in the property and assets of the insolvent.

In many of the States there is a class of officers called "receivers," whose rights and duties are defined by statute, and who, when appointed, take by operation of law a legal estate in the property and assets of the insolvent in like manner as do assignees in bankruptcy, and the courts have undoubtedly, in many cases, held receivers of that class liable as assignees of leases, because of the *privity of legal estate* which had been created between them and the lessors, and which consequently rendered them liable on all the covenants that run with the land.

But this was not that sort of a receivership. This was an ordinary *chancery* receivership, created at the instance of the Wabash Company, who was the common debtor of all the defendants.

That there shall be no dispute concerning the character of this receivership, we quote and adopt the following paragraph on that subject found in the brief of counsel for appellants, at page 39:

> The standard definition of a receiver is, a ministerial officer of a court of chancery, appointed as an indifferent person between the parties to a suit, to take

possession of and preserve, *pendente lite* the fund or property in litigation—a mere custodian, having no powers except those conferred by the court, whose acts within the scope of his authority are the acts of the court appointing him, whose holding is the holding of the court, and whose pecuniary obligations in the absence of fraud are the obligations of the fund or property which he holds.

Except in matters regulated by express statutes, no other kind or class of receivers is known to the law. The present case is one strictly *of ordinary chancery receivers*; and whatever were the circumstances or grounds or theories of their appointment, they became when appointed, no more and no less than ordinary chancery receivers."

Now, assuming that this was *an ordinary chancery receivership* and that Humphreys and Tutt were no more and no less than ordinary chancery receivers, we have the question narrowed to this form: Does an ordinary chancery receiver take *a legal estate* in the property placed in his custody?

If a chancery receiver takes a legal estate in the leasehold term over which he is appointed, then he is an assignee of the term, and it might well be contended that by reason of the privity of estate thus created between him and the lessor, he would become liable on the covenants to pay rent as well as on all the other covenants that run with the land. But it is only where a privity of legal estate exists, and where the party called a "receiver" has taken the whole legal estate of the lessee in the term, that he can be charged as assignee. It is the privity of legal estate,

and that alone, which renders the assignee of a term liable on the covenants.

The general and familiar rule with respect to the liability of assignees of leases is very clearly stated in *Stewart vs. Long Island Railroad Company* (102 N. Y., p. 607), in which it was said:

"Where a lessee assigns the whole estate without reserving any reversion therein to himself, a privity of estate is at once created between his assignee and the original lessor, and the latter has a right of action directly against the assignee on the covenants to pay rent, or any other covenant in the lease which runs with the land; but if the lessee sub-lets the premises, reserving or retaining any such reversion, however small, the privity of estate is not established and the original landlord has no right of action against the sub-lessee, there being neither privity of contract nor of estate between them."

So in this case, the Wabash receivers were not liable to the Quincy Company *as assignees, unless they took the whole legal estate* of the Wabash Company in its lease of the Quincy Road.

Counsel for appellants have not referred to one single case in which it has ever been held by any court that *an ordinary chancery receiver took title* to the property over which he was appointed. On the other hand, exactly the contrary is abundantly shown by the following authorities, in which the question has been directly considered and determined:

In *Wood's Landlord and Tenant* (2nd Ed., p. 723) the rule on this subject is briefly but fully and forcibly stated as follows:

"A receiver *pendente lite* appointed in an equity suit is clothed with no estate in the property entrusted to him, and is a mere custodian of it for the court, and therefore by taking possession of the leasehold estate he does not become an assignee of the term."

The question of whether receivers in chancery take the legal title to the property placed under their control has also been recently considered in this court. In speaking on that subject in *Chicago Union Bank vs. Kansas City Bank* (136 U. S., 223) the Court said:

"A receiver derives his authority from the act of the Court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court for the benefit of the party ultimately proved to be entitled, *but not to change the title* or even the right of possession in the property. *Skip vs. Harwood*, 3rd Atk., 564; *Wiswall vs. Sampson*, 14 How., 52, 65; *Ellis vs. Boston, Hartford & Erie R. R.*, 107 Mass., 1, 28; *Maynard vs. Bond*, 67 Mo., 315; *Hermann vs. Fisher*, 11th Mo. App., 275, 281."

The case of *Gaither vs. Stockbridge* (67 Md. 222) is also one in which the identical questions presented in this record were considered and determined.

In that case the "Duffy Malt Whiskey Company" became insolvent, and under a creditor's bill Stockbridge was appointed receiver, and directed by the Court "to take charge and possession of the goods, wares and merchandise, books, papers and effects of the company." The whiskey company had leased from Gaither a warehouse, and when the receiver was appointed he took possession of the warehouse and the property therein,

and retained the same until the goods were sold out at auction. After the goods had been sold and removed from the premises, the receiver tendered the key of the warehouse to Gaither, the lessor, who refused to receive it. Gaither then petitioned the Court to pass an order directing Stockbridge, the receiver, to pay to him a quarter's rent that soon after fell due, out of moneys received from the sale of the property of the whiskey company. In deciding that case the Court said:

"There are two questions presented in this appeal: 1st, Whether the receiver become assignee of the term created by the lease from the appellant to the Duffy Malt Whiskey Company of the warehouse and premises occupied by that company at the time of the appointment of the receiver, so as to make him liable for the rent that become due and payable on the 1st of December, 1886; and 2nd, If the receiver has not become such assignee or tenant, and as such liable for the rent, whether the appellant had any such preferred lien or charge, *for the accruing rent*, upon the goods and chattels of the lessee upon the premises at the time of the appointment of the receiver, and which went into his hands, and were sold on order of Court and taken from the premises, before the rent become due, as will entitle the appellant to be paid in full out of the proceeds of the sale of such goods and chattels?

"The Duffy Malt Whiskey Company was alleged to be utterly insolvent and unable to pay its debts; and, upon a creditor's bill filed, the appellee on this appeal was appointed receiver on the 12th day of November, 1886. By order of the Court appointing the receiver, the latter was ordered 'to take charge and possession of the goods, wares and merchandise, books, papers and effects' of the company so alleged to be insolvent. In pursuance of this order the receiver did take possession of such goods and chattels found on the premises, and retained

the same until the 22nd day of November, 1886, when, under an order of Court, he sold such goods and chattels, at auction, on the demised premises where they had remained from the time the receiver took possession thereof. After making sale of the goods and chattels and the same had been removed from the premises by the purchasers, the receiver, on the 29th day of November, 1886, tendered the key of the warehouse to the attorneys of the appellant, who refused to receive the same; and afterwards, by direction of the Court, he deposited the key with the Clerk of court for the appellant.

"The ordinary receiver of a court of chancery is supposed to be an indifferent person as between the parties to the cause, whose functions or office it is to receive and preserve the property or fund in litigation *pendente lite*, when it is made apparent to the Court that the rights of the parties concerned require such protection. He is an officer of the court, and the fund or property entrusted to his care is regarded as being in *custodia legis*, to await the ultimate disposal thereof by the court, according to the rights and priorities of the parties concerned. The court itself has the care of the property, by its receiver, and that officer being the mere creature of the court, has no powers other than those conferred upon him by the court, or derived from its established practice. *His appointment does not change the title of the property, or create any lien upon the same, in favor of any of the parties interested; his holding being for the benefit of the party who may be ultimately determined to be entitled.* *Booth vs. Clark*, 17 How., 322, 331; *Ellicott vs. Ins. Co.*, 7th Gill., 320; *Ellicott vs. Warfield*, 4 Md., 85.

"Such, then, being the nature of the office and duty of a receiver and his relation to the court, it is manifest that the scope of his duties and powers are very much more restricted than those of an assignee in bankruptcy or insolvency. *In the case of an assignee in bankruptcy, the law casts upon such assignee the legal title to the unexpired term of the lease, and he thus becomes*

signee of the term by operation of law, unless from prudential considerations he elects to reject the term as being without benefit to the creditors. But not so in the case of receivers, unless it be as in the State of New York and some of the other States, where by statute a certain class of receivers are invested with the insolvent estate, and with powers very similar to those vested in an assignee in bankruptcy. Booth vs. Clark, 17 How., 331, 335.

"*The ordinary chancery receiver, such as we have in this case, is clothed with no estate in the property*, but is a mere custodian of it for the court, and, by special authority, may become an officer of the court to effect a sale of the property, if it be deemed necessary for the benefit of the parties concerned. *If the order of the court under which the receiver acts embraces the leasehold estate, it becomes his duty, of course, to take possession of it. But he does not, by taking such possession, become assignee of the term in any proper sense of the word. He holds as he would hold any other personal property involved, for and as the hand of the court and not as assignee of the term.*

"In those cases where the goods of the lessee are remaining on the demised premises at or after the time when the rent becomes due, and the landlord seeks to exercise his right to distrain, and the only impediment to the exercise of the right is the possession of the court by the receiver, it seems to be a settled rule of practice to order the receiver to pay the arrears of rent out of the proceeds of the property, or to permit the landlord to proceed with his distress, notwithstanding the possession of the receiver. *Martin vs. Block*, 9th Paige, 64; *Exparte Plummer*, 1st Atk., 103, 104.

"But here there is no such question presented, and we do not understand that it is contended that the receiver has become the assignee of the entire residue of the unexpired term of the leasehold estate, with the right to dispose of it. What seems to be contended for is, that the receiver has, by entering upon the demised premises,

to take possession and to sell and dispose of the goods and effects of the lessee, under the order of the court, made himself liable, as assignee or tenant of the premises, to the extent of the quarter's rent falling due on December 1, 1886. But this, we think, manifestly can not be maintained. No such liability should be imposed upon the receiver for simply performing his duty under the direction of the Court. The Court has given no direction that the leasehold interest should be sold; and, indeed, the lease, by its terms, is not assignable except it be by the express written assent of the lessor, and it is restrictive in respect to the use of the demised premises. We are clearly of opinion that the receiver is neither assignee in fact nor by operation of law, and therefore could not be held liable as tenant for the use and occupation of the premises."

The case of *Yaeger vs. Wallace* (44 Penn. State) was one in which the question of whether receivers, in Chancery, take a legal estate in the property placed in their custody, was sharply presented and squarely decided. In that case Wallace was appointed receiver of a partnership estate, and *as receiver* he sued Yeager *in trover* for the conversion of a quantity of marble and other assets of the firm. As trover could only be maintained by one having a *legal title*, the question was as to whether Wallace, the receiver, took such title to the assets of the firm. In deciding the point the Court (Strong J.) said:

"But can a receiver of the property of a partnership maintain an action of trover in his own name for the conversion of the personal property of a firm by a wrongdoer before the appointment of receiver was made? He is but an officer of the Court which appoints him, and does not become *the legal owner* of the property which he is

required to take in charge. The appointment of a receiver does not transfer to him the legal rights of the partnership in any of their choses in possession or in action. Trover can only be maintained by him who has the legal right. How, then, can the receiver sue, except in the name of the firm? That he can not, not only seems manifest upon principle, but is established by authority. Thus in Taylor vs. Allen, 2 Atk., 213, Lord Chancellor Hardwicke appointed a receiver to collect the assets of a testator, and empowered him to bring actions *in the name of the executrix*. In Pitt vs. Snowden, 3 Atk., 750, the same chancellor said, a receiver must distrain in the name of him who has the legal right. * * * *

"I do not find it has ever been decided that a receiver can sue in his own name for any debt, claim or demand of a party of whose effects he has been appointed receiver, or to recover the possession or control of any real estate or choses in action of such party, unless some statute has enabled him. He has always been regarded, not as having the legal right, but as a mere custodian to take charge of the property during a pending litigation. If possession be withheld from him by the party whose property has been taken charge of by the Court, delivery to the receiver is enforced by attachment. If a third person, not a party to the proceedings in equity withhold the property, suit may be brought by the receiver with the consent of the Court, but he must bring it in the name of him who has the legal right. In New York, it is true, a receiver is more than a custodian. He is a statutory assignee. But this is in consequence of the statute of that State of April 28, 1845, Laws 90, 91, and of the code of 1849. * * * * * *

"Without the statutes of New York, it was never ruled in that State that a receiver had the legal title even to personality. The right to sue in his own name was always rested upon the act of 1845 or upon the Code, or upon an act passed in 1825, not upon any rule or course of practice in chancery. See 1 Johns. Chan. Cases 10, S. & M. 577. In Wilson v. Allen, 6 Barb, 545, it is said

that at law an ordinary receiver was not considered as having the legal title, so as to authorize him to institute a suit in his own name for any debt or demand transferred to him (under the order of his appointment) or to the possession or control of which he was entitled, under an order of the Court, until the act of 1845. There is no act of Assembly in this State that gives to a receiver of a court of equity anything more than an equitable interest in the property or rights in action committed to his charge or which invests him with the legal ownership. It seems, therefore, to follow that he can not sue in his own name, and that the present suit, being in the name of the receiver, was erroneously brought."

In the light of the foregoing authorities, we might look in vain for a more accurate statement of the law than is contained in the opinion of the Court below in this case. After stating the facts the Court (Brewer, J.) then said:

"We start with this fact that prior to the appointment of the receivers intervenor's claim was subordinate to that of the mortgagee. It was a claim, of course, good against the income, but not against the corpus—at least not good against the corpus until after the payment of the mortgages—and the first question is whether the action of the receivers in taking possession or of the Court in ordering possession changed the status and gives to intervenor's claim a higher position then it theretofore had. It is strenuously insisted by intervenors that it did, and they say that by taking possession of this leased property the receivers became virtually the assignees of the lease, and therefore bound by its terms, and bound to an extent which binds the property in preference to the lien of the mortgagees. A multitude of citations are made from the text books and decided cases to the effect that where a mortgagee institutes foreclosure proceedings, and upon his application a receiver is appointed, and such receiver takes possession of the

property leased by the mortgagor, such taking of possession is an acceptance of the lease and binds the receiver as assignee, and binds so as to concede a preference to the lessor in respect to his rental. In other words, if A, a mortgagee, commences foreclosure proceedings against B, a mortgagor, and a receiver, appointed at his instance, takes possession of the property of C leased by B, such possession of the leased property is an acceptance by the receiver of the lease, makes him an assignee of the lessee, and binds both him and A, the mortgagee, to the full amount of the mortgage property to the payment of the rents.

"High thus states the rule: 'As a rule, receivers are not liable upon the covenants of the person over whose effects they are appointed, but become liable solely by reason of their own acts, and receivers who have been appointed over a corporation and who have accepted the trust and taken possession of the assets, do not thereby become liable for rent of the premises held by the company under a lease.

"'Nor can they be held liable until they elect to take possession of the premises or until the doing of some act which would in law be equivalent to such an election, but when a receiver enters upon and occupies premises which had been leased to a corporation over which he is appointed, he thereby becomes liable for the rent due under the lease, the liability in such cases being the common law liability of an assignee of a lease and not for the debt due from the corporation, and in such case, the facts being undisputed, it is proper for the Court to direct the receiver to make payment to the lessor without a reference to determine the *the* matter.'

High on Receivers, 2d Ed., Sec. 273.

"This proposition, fortified as it is by ample citations, is conceded; but is it applicable? This receivership was upon the application of the mortgagor, a party in possession of various properties---some owned, some

leased, and all subject to various obligations. Could the action of the mortgagor or the decision of the Court upon his application change the relative rights of the mortgagee and the lessor? Was it in the power of the Court, upon the application of the mortgagor alone, to charge the mortgagee with obligations to which he never assented?

"That this bill was filed by the mortgagor is, of course, conceded, and that its theory was not the preservation of any single creditor's rights, but that of all its creditors, secured and unsecured, is evident from these extracts from the bill:

'That all or nearly all of said mortgages embraced all rolling stock to be thereafter acquired by the companies executing such mortgages, but that, as such original companies and those lines of railroad have been gradually absorbed in orator's vast system, the rolling stock on said entire system had become so intermingled as to be incapable of division according to the original ownership of the said several lines of road according to said several mortgages, and any attempt to control or dispose of portions of such rolling stock by any court or courts not having jurisdiction of the whole and not competent to deal with orator's entire property as a unit would produce great confusion and uncertainty, and would result in great loss to all persons interested in said rolling stock or in orator's property or securities; * * * and orator avers that the interest of the orator in said road and of all its crediters and holders of the bonds aforesaid are greatly imperiled by the existing prospect of the disruption of said road on the happening of the default impending as aforesaid, and the interests of all parties can only be protected by the interposition of a court of chancery; that if said lines of railroad are broken up as aforesaid, and the fragments thereof placed in the hands of various receivers, and the rolling stock, materials and supplies seized and scattered abroad in the manner above indicated, the result will produce irreparable injury and damage, not

merely to orator, but to all persons having any interest in said lines of road and the securities thereof."

"The idea which underlies this bill is that which underlies the action of a voluntary bankrupt under the bankrupt law. Finding himself insolvent he surrenders his property to the court to be disposed of for the benfit of his various creditors. Such action in no manner changes the relative rights of his various creditors. They stand subsequent to this action as they did before, and their various right and equities are determined not by his action in surrendering his property to the custody of the court, but by the terms and obligations of the contracts theretofore entered into. Narow the question in this way: Suppose A is the owner of a mill and the lessee of an adjacent farm. Having mortgaged both his mill and his leasehold interest, and finding himself insolvent, he applies to the court by bill for the appointment of a receiver to take possession of his property and dispose of it for the benefit of his creditors: Can it be that his action in filing the bill or the action of the court in appointing a receiver makes the claim for rental, an unsecured obligation, paramount to the secured lien of the mortgage? The proposition will be startling if true. It would put it in the power of a mortgagor to dispossess the vested lien of the mortgagee and render such lien subordinate to unsecured claims. It is true that after the appointment of a receiver the mortgagee came in with an application for a foreclosure; but the assertion of his rights to a foreclosure was not different from that of the assertion of the lessor to his claim for rent. Each took what rights were given him by his prior contract, and neither by his action waived any of his rights or consented to a subordination of his priority. It is true, also, that the holder of the general mortgage prayed the Court to extend the receivership over a part of the property conveyed to it as a motgagee. Perhaps if that application had been granted some different question might now arise; but the Court expressly decided against the

application, leaving the receivership to stand as it was in the first instance---one granted on the application of the mortgagor and one whose appointment it was believed would in no manner change the relative rights of any creditor."

The case of *Central Trust Company of New York vs. Wabash, St. Louis & Pacific Railway Company*, (Swayne, intervenor—in Cir. Court U. S. for Dist. of Indiana, (46 Fed. Reporter, 26), was one which grew out of this identical litigation. That was an intervention by Swayne, trustee, to recover from Humphreys and Tutt, receivers, a rental due under a lease made by the Indianapolis, Peru & Chicago Railroad Company to the Wabash Company in June, 1881. When Humphreys and Tutt were appointed receivers of the property of the Wabash Company they took possession of the Indianapolis, Peru & Chicago Road (a leased line) and operated it from May 29, 1884, until October 23, 1885. No rent having been paid by the receivers, Swayne, the trustee, in a senior mortgage, intervened, and prayed the court to make an order directing the receivers to pay the rental, and also prayed that the claim for rental be decreed a lien superior to all mortgages on all the property of the Wabash Company. In that case all the questions presented upon this record were reviewed and the court (Woods, J.) held:

"When an insolvent railroad company upon its own petition procures the appointment of receivers to take possession of its road and leased lines, and in the same suit trustees of a mortgage upon the property ask and

are denied an appointment of receivers or an extension of the receivership under their cross-bill, but obtain a decree of foreclosure and sale of the property thereon, the rentals of the leased lines while in the possession of the receivers do not become a charge upon the corpus of the property to be paid in preference to the mortgage debt."

2d. *The material errors of appellants' counsel consist in his denying that the Quincy Line constituted a portion of the receivership property, and in refusing to recognize the fact that in this case the receivers could exercise no discretion or election.*

The question of whether the Quincy Line constituted a portion of the receivership property will be more fully examined in another paragraph of this brief.

We now merely call attention to the fact that when the Courts, in the multitude of cases cited by appellants, have spoken of the liability of receivers *as assignees*, they have in no instance had reference *to receivers in chancery*, nor has the property for which rental has been allowed constituted any portion of what the Court has undertaken to preserve. In every case in which *receivers in chancery* have been required to pay rental, it has been for the use of something outside the estate which the Court has undertaken to administer. To those cases we take no exception. They only hold, that where the property of one party has been used *for the benefit of another*, the party for whose benefit it was used ought to pay a reasonable compensation for its use.

If, for instance, a railroad company prior to a receivership was occupying offices in a building as tenants, and the receivers have seen fit to remain and occupy the quarters *for the benefit of the trust property*, it has, in such cases, been properly held that the receivers ought to pay, from the trust fund, a reasonable rental. No one doubts the soundness of that rule, but it is only for the use of property which *they were not required to take into their possession* that receivers in chancery can make or adopt contracts to any extent.

So, if in this case, the receivers took possession of the Quincy Road under the order of their appointment, then it was receivership property; there was no contract about it. It was a part of the estate to be preserved until such time as the Quincy Company should assert its own superior right to possession.

There is certainly a broad distinction between taking possession of property belonging to one *not interested in the receivership* and using it for the benefit of those who are, and in taking possession of property under an order of court *for the mere purpose of preserving it for the benefit of its owners*. In other words, if a court of equity takes possession of property and preserves it for the benefit of its owners, the Court can not on any equitable principle be said to assume the payment of a rental to the parties benefited.

If, to save a ship for its owners, a third party was to make use of its boats, engines and tackle, would an

action lie against the third party in favor of the owners of the ship for the use of the boats, engines and tackle? In such case there would seem to be no obligation to pay, because the property was used for the benefit of its owners, and not for the benefit of the party using it. But, on the other hand, if in order to save a ship, a third party should, with the knowledge and consent of its owners, use the boats, engines and tackle of a stranger, the case would be different; there would then be a clear obligation resting on the owners of the ship to pay the stranger a reasonable compensation for the use of his boats, engines and tackle, because his property had been used for their benefit.

To apply the principle to this case we contend that the Wabash receivership was established because it appeared to the Court from the allegations in the bill of complaint, that the financial condition of the Quincy Company, as well as that of all the other defendants, would be improved by keeping all the railroads and rolling stock previously in possession of the Wabash Company together, until such time as the several parties interested (all of whom were made defendants in the bill) could, if they so desired, be heard in their own behalf in opposition to such a course.

Therefore, when the Court took jurisdiction of the case and appointed receivers over all the property previously in possession of the Wabash Company, it thereby said substantially to every party to the suit that it would

administer the estate on equitable principles, and that should the income derived from the operation of the roads be insufficient to satisfy the claims of all, it (the Court) would in that case give the funds to those who were first in right.

In such a receivership one party to the suit can only have, as against the others, that to which he can show a superior equity, and in such cases we do not think it has ever been held that by reason of any order made by the chancellor, one party has become entitled *on the score of contract with the Court* to more of the fund than equity would give him.

II.

It was properly held by the court below, that there was nothing in its orders, or in the conduct of the receivers, which rendered either the court or the receivers responsible for the rental due appellants under the lease to the Wabash Company.

From the beginning of this litigation it has been contended by appellants, that the receivers were liable for the rental due from the Wabash Railway Company to the lessor, because, as they have said, the receivers *elected* to take and hold the leased property under the lease. If the receivers had exercised that election at the instance and for the benefit *of the Wabash Company*, that fact, we are sure, would furnish a sufficient reason for holding every property interest *of the Wabash Company* in all the lines of the system for the full satisfac-

tion of their claim. But certainly no action of the receivers, taken at the instance of the Wabash Company, could, on any principle of justice, authorize the court to invade the property rights *of the other defendants* in the suit—those with whom the appellants have had no contract relations—in order to satisfy this claim of the Quincy Company for rental.

In his brief (page 44) counsel for appellants plants his claim for rental on the following proposition:

"The receivers here, it is true, were directed by the order of their appointment to take the leased lines, but they were not compelled or compellable to act under this order. When a receiver obeys such an order of court, he obeys voluntarily, because he may always decline the service of receiver. The act of the receivers in taking the leased property and continuing to hold and use it under the order of the court, was, in every sense, *an election by the receivers.*

But, if it could be held that the action of the receivers following the order of court was not such an election by them as bound them and the estate in their hands for the payment of this rent, this would simply transfer the origin of our claim from the receivers *to the court itself.* If the receivers did not elect to take the property under the lease, the court did. Can the court, no matter how great its powers or jurisdiction, hold and use under a lease the property of one who is solvent and makes no application for the aid of the court, and then hold that because the court and not the receiver made the election, no rent shall be paid? The question needs no consideration. The court is as incompetent to do this as the receivers would be. The test is: Was the property held and used by the receivers in the execution of their duty as receivers; and it is perfectly immaterial whether they held it as the result of their own judgment or choice, or in the execution of an order of the court."

Now in stating his proposition we think counsel for appellants makes the liability of the receivers turn upon an immaterial inquiry. He says the receivers are liable "if they held and used the leased property *in the execution of their duty as receivers;* and that it is perfectly immaterial whether they held it as the result of their own judgment or choice, or in the execution of an order of Court."

The vice of his proposition lies, we think, in the fact that counsel wholly ignores the objects and purposes for which the Wabash receivership was established. If it was established for the preservation of the property of the Quincy Company, as well as for the preservation of the property of the other defendants in the suit; and if, in the execution of their duties under such a proceeding, the receivers took possession of the Quincy Road and preserved it for its own good, we can not see on what principle *the taking of possession*, under such circumstances and for such purposes, can be said to make the court or its receivers liable to appellants on the personal covenants of the Wabash Company to pay them a rental. If the court or its receivers had taken and used the road of the Quincy Company for their own benefit, *or for the benefit of any other party to the suit*, then it is clear that they, or the party for whose benefit the Quincy Road was used, should be required to pay a reasonable compensation for the use.

But that is not this case. The road of the Quincy Company was not taken or held by the receivers at the instance of any other defendant in the cause, and hence no other defendant in the cause ought to be charged with its rental.

The whole argument made by appellants in support of their contention, to the effect that the receivers *elected to accept the lease*, is based, as it seems to us, upon a total misconception as to the nature of the proceeding and the purposes for which these receivers were appointed. The bill was filed by the Wabash Company because of its insolvency and consequent inability to longer continue the fulfillment of its contracts. It prayed for the appointment of receivers to take possession of and operate all its railroads for the benefit of all its creditors, according to their respective legal and equitable rights. It brought all the lessor companies as well as all parties interested as mortgagees or trustees, including the appellants, before the Court as defendants, and from thenceforward each was at liberty to assert his or their contract rights without any promise or expectation that the Court would, at any stage of the proceedings, cast the burden of any unprofitable leases or other agreements, entered into by the Wabash company, upon any particular defendant, or class of defendants, for the sole purpose of paying the appellants their rental.

It is true that the order appointing the receivers directed them to pay, generally, from earnings, all rentals

accrued, or which might thereafter accrue on the leased lines; but there was nothing in the order appointing the receivers to induce appellants to believe that their claim for rental would be treated *as a preferred debt*, or charged as a lien upon the other lines of the system, while, on the contrary, every subsequent order of the Court was ample notice to them that their road would be operated on its own merits, and that no rental would be paid unless it was earned.

The material facts on this point are, that within one month after their appointment the receivers reported to the Court that the earnings of this Quincy Road had never been sufficient to pay its operating expenses and rental and the receivers then prayed the Court for instructions with respect to the manner in which they should keep the accounts of the earnings and expenses of said line.

In answer to their petition the Court, on the 28th day of June, 1884, instructed the receivers to keep the accounts of the earnings and expenses of said line separately, and also directed them to make quarterly reports, showing not only the earnings and expenses of said line, but also the methods by which they ascertained such earnings and expenses.

Afterward, in September, 1884, when the receivers asked the advice of the Court with respect to the payment of interest on one of the branch lines of the system, known as the "Havana Division," the Court (Treat, Judge) said:

"I stated at an early day, and Judge Brewer has gone over the matter and we are in accord with regard to it, that I am not going to take the money that belongs to the underlying mortgages to pay interest on non-earning branches. If they have got to fail they must fail. I will protect the underlying mortgages especially, and they haven't enough here to do it. * * * If this branch is earning enough to pay its own interest, that is another inquiry; but certainly I am not going to sit here and order that the earnings that belong to other branches in this consolidated system shall be taken to pay concerns that do not pay running expenses. Let them collapse."

And again, in March 1885, the receivers reported to the Court that from May 29 to November 30, 1884, the operating expenses of the Quincy Line had been $10,-201.93 *greater than its earnings*, and in consideration of that fact they asked the Court for advice with respect to the future operation of said line, and concerning the payment of the rental agreed to be paid by the Wabash Company in its lease. In answer to that petition the Court (Brewer, J.) then entered an order (Record p. 88) which was, in part, as follows:

"3d. Where a subdivision earns no surplus, simply pays operating expenses, no rent or subdivisional interest will be paid. If the lessor or subdivisional mortgagee desires possession or foreclosure, he may proceed at once to assert his rights. While the court will continue to operate such subdivision until some application be made, yet the right of a lessor or mortgagee whose rent or interest is unpaid to insist upon possession or foreclosure, will be promptly recognized. That, it is true, may work a disruption of the system, as evidenced by the movement just made in respect to this Cairo Division. But the proceeding for disruption will come

from the subdivisions. The Court is not sloughing off branches, tearing the system in two; but the disruption, if it comes, will come from those who seek separation and have legal right to do so."

In view of the foregoing facts, it seems impossible to state the true theory of the proceeding, or to define the rights of the several parties under it, with greater accuracy than was done in the opinions rendered in the Court below. In discussing this phase of the case, Record p. 33, the Court (Brewer, J.) then said:

"Again, if the action of the Court in making the appointment, and of the receivers in taking possession, did not of itself create a new and legal obligation against the mortgagees, are there any equitable reasons why the claim of the lessor should be given priority to that of the mortgagee? The lessor was defendant as well as the mortgagee; each knew his rights; each, summon-d into court, was at liberty to assert his rights. Neither was told directly or by implication that he would gain aught by the action of the Court in making the appointment. As the mortgagee might come in and did come in asking foreclosure of his mortgage, so the lessor might come in, and many did, demanding the surrender of the leased property for non-payment of rent. These very intervenors, after the lapse of some months, came in and asked possession of their property, which was promptly surrendered. Why should the mortgagee be compelled to pay the lessor any more than the lessor be compelled to pay the mortgagee? Each was summoned into court, each was called upon to make a showing of its claim, and each did so in time and manner that suited it. Because there were various properties, covered by separate mortgages, all merged in one system, and as such covered by one subordinate mortgage, is there any equitable reason why the Court se.zing upon all of the

properties at the instance of the common debtor can be said to have created any new and different equities between these various creditors? Did not each stand upon his legal rights—rights as they existed before the receivership, and rights which could be asserted at any time, and were, in fact, asserted as soon as each party saw fit? There was certainly nothing in the action of the Court or the various orders made by it which gave to any party the right to expect other than his legal claims. Of course, the order in the first instance was to pay rentals out of the income, and that income, as we have seen, is all exhausted in preferential debts and operating expenses. Early in the history of receivership the order of the Court was to keep separate accounts of the earnings of the different lines, and the clear intimation of all the orders and opinions, as well as the express language of many, was that the income from any property part of the general system would be appropriated to the specific claims upon that property." It is undoubtedly true in railroad foreclosures that, by the decisions of the Supreme Court, certain claims have been adjudged preferential and superior to mortgages and secured liens. So far as these rulings have been made this Court has unhesitatingly followed them; but it can not be that the security of a mortgage deed, even if it be a railroad mortgage, is open to displacement by every unsecured creditor. Only the cogent public reasons, which have been so carefully considered and well stated by the Supreme Court, justify any postponement of the priority of a mortgage debt. So far as I am individually concerned, I am unwilling to go a step beyond the matters and rules laid down by the Supreme Court. As to all outside of those matters, I believe the sacredness of mortgage obligations should be observed, and that secured debts should be given the priority which the contracting parties awarded then.

And in reviewing, in the court below, the contention

of appellants, to the effect that the receivers had *elected to accept the lease* as assignees, the Court (Thayer, J) then said:

"Attention has already been called to the fact that the bill in this case was filed by the mortgagor against all persons and corporations, including the lessors who were interested in the various roads forming the complainant's railroad system.

As I understand the bill of complaint, the complainant professed to be acting not alone in the interest of mortgagees, but in the interest of all the corporations whose roads had become an integral part of the system, whether by lease, consolidation or otherwise.

It was substantially represented by the bill that the affairs of the complainant had become so complicated by the various mortgages that had been executed, the consolidations that had taken place, and the leases made or assumed, and by the admixture of rolling stock, that the best interests of all parties concerned demanded the appointment of receivers over the whole system, as the only feasible method of working out the equities appurtaining to each.

It was on account of such representations that the receivers were appointed and ordered to take possession of the whole system. In other words, the receivership was not created for the benefit or protection of any one interest or class of interests, but for the benefit of all parties to the suit who were in any wise interested in the system. The lessor companies, whose roads went into possession of the receiver, were advised of such facts by the form of the bill and by the prayer for relief. They were at liberty, at any time after it was filed, to show that the extension of the receivership over the leased lines was not necessary to the protection of any interest of the lessor companies, or that it was detrimental to such interests. If such showing had been made (and it appears to me that the lessor companies were cited into court to confess or deny the averments of the bill in that

behalf), the leased lines would unquestionably have been released at any stage of the proceeding.

Intimations to that effect, and of the theory on which the court was proceeding appear to have been given during the progress of the case from time to time; but so long as the lessor companies acquiesced in the averments contained in the bill, and on the faith of which receivers were appointed, it appears to me that the receivership continued to stand for their protection and for the protection of the interests of all persons and corporations who were parties to the proceeding, and that so long as that state of affairs existed the relative rights of the parties were not changed, and that the mere possession by the receiver of the leased lines did not have the effect of making the rentals a charge on the body of the mortgaged property, superior in rank to the mortgage debt."

The foregoing conclusions concerning the theory of the bill, and the purposes of the receivership made by the courts in which the receivers were appointed, ought, we think, to be conclusive, and yet counsel for appellants states, on page 43 of his brief, that "*the suggestion, or claim, or pretence, that the court could have taken possession of the Quincy Road for the benefit of the lessor*, is as contrary to all reason and fact as it is to all law."

It requires no argument, we trust, to demonstrate that the conclusions reached by the court below on this point are, nearer sound than the present contentions of counsel.

III.

This was not a case in which parties who could take as assignees if they should so elect, entered upon and occupied leased premises for the purpose of determining whether they would accept or reject a lease.

Assignees in bankruptcy, statutory receivers, and, in fact, all who may take, *if they so elect*, as assignees by operation of law, are entitled to a reasonable opportunity after their appointment, regard being had to the nature of the property, to determine whether they will accept or reject a leasehold interest. If they find that the lease is likely to prove a burden to the estate, they may reject it.

In *Platt on Leases* (Vol. 2, 434-5) the rule on that subject is stated as follows:

"The general assignment of the bankrupt's personal estate under the Bankrupt Act did not of itself vest a term of years in the assignees; nor were they bound to accept a lease, or agreement for a lease, to which the bankrupt was entitled, as it might prove burthensome, a *damnosa hæreditas*, instead of profitable to their trust. Its adoption or rejection was subject to their discretion, the operation of the assignment being suspended in the interval, and the estate remaining vested in the bankrupt; but if they once accepted the term, they placed themselves in the situation of other assignees, and took the estate with all its charges; and the bankrupt was then absolved from the payment of any rent accruing due, or breaches of covenant committed, after the date of the commission.

"A reasonable time was allowed the assignees to ascertain the value of the lease before they made their election; for which purpose they might have it valued, or put up for sale, without danger of such act being deemed an acceptance. If, however, they accepted a bidding, or dealt with the estate as their own, or used it in a manner injurious to the persons otherwise entitled, they were not within this protection. Hence, it was often a question of difficulty whether the conduct of the assignees in the particular case amounted to an adoption of the term."

We do not question anything contained in the foregoing quotation, when the rule announced is applied to those *who have an option, and who may take as assignees if they so elect;* but the rule can have no possible application *to receivers in chancery*, who only hold as officers of the court, who can exercise no election, and who can not, if they would, take a legal estate in the property placed in their custody. In order to render one, called a "receiver" liable as assignee of a lesse, two things are absolutely essential:

First. The receiver, or person to be charged, must be one *who is capable of making an election;* and

Second. He must by some unequivocal act evince his determination *to accept the term.*

Both those conditions are wanting here. In this case Humphreys and Tutt *had no power to make an election*, and even if they had possessed the requisite authority, the record shows no act on their part evincing a determination to accept the lease of the Quincy Road. In this case the record shows that within one month after their appointment the receivers reported to the Court that they were operating the Quincy Road at a loss, and that it had never earned its operating expenses and rental. And while the Court did not then order its absolute abandonment, it directed the accounts of its earnings and expenses to be so kept that its liabilities could be readily ascertained and its rights, as against the other line, equitably adjusted, and from that time for-

ward every report made by the receivers and every order made by the Court was notice to the Quincy Company that its rent would not be paid unless it was earned by the property.

2. *When receivers in chancery take possession of and use property not belonging to the fund in court, they are only required in equity to pay a reasonable compensation for its use.*

If it be true that the Quincy Road *constituted a portion of the receivership property*, which was being preserved by the Court for its owners, then its owners could have no claim on the court or its receivers for its use. But if the Quincy Line did not constitute a portion of the receivership property, then its owners should only have a *reasonable compensation* for the use of their road. Where neither privity of contract nor privity of estate exists there is no other known method of measuring compensation.

Cars and engines need not be used, nor need houses be occupied in order to preserve them, but a railroad is a going concern; it is not like other property; it has a public duty to perform, and it has to be operated. Therefore, the question of how much the use of a railroad for a given time is reasonably worth, depends upon how much it earned in excess of its operating expenses. As the Quincy Road was preserved and operated by the receivers at a loss to them of more than twenty thousand dollars, and as the owners cou'd not have lawfully aban-

doned it, and as there is no presumption or proof that they could have done better with it, on what principle shall they be awarded compensation? What was the use of such a road reasonably worth?

That they were only entitled to recover a *reasonable compensation*, is abundantly shown by the authorities.

In *Miltenberger vs. Logansport Ry. Co.* (106 U. S., 286), a receiver, who had been appointed at the instance of mortgage creditors, took possession of and used a line of railroad leased to the mortgagor, but not covered by the mortgage. The Court only allowed the lessor company *a reasonable compensation* for the use of the leased line by the receiver.

In *Kneeland vs. Union Trust Company* (136 U. S. 89), a receiver was first appointed at the instance of a judgment creditor, and four months later he was re-appointed at the instance of trustees under mortgages. The receiver took possession of and used certain rolling stock leased to the company, and the Court held (page 101) that the lessor was only entitled to recover a *reasonable compensation* for the use of the rolling stock from the date of the last appointment.

In *Coe vs. Railway Company* (27 N. J. Eq., 37), an agreement was made with the Rhode Island Locomotive Works, under which it furnished locomotives to the railway company under a lease, with the understanding that upon payment in full of the rent reserved, the locomotives should become the property of the railway com-

pany. When receivers were afterwards appointed over the property of the railway company, there was due for rent about $120,000. The receivers requested the lessor to leave the locomotives in their possession, that they might use them in the operation of the road. The petitioners in that case based their claim for rental upon the ground that the receivers requested that the locomotives be left in their possession for use on the road. In defense of the claim, the receivers alleged a notice to them by the bondholders not to pay the rent because the property was not worth the amount agreed to be paid, and it was not for the interest of the trust that the rent should be paid.

It was held that the petitioners had no equity arising from the conduct of the receivers to have the contracts specifically performed without regard to the advantage or disadvantage to the trust fund, and the Court refused to grant the prayer of the petitioners because it was not satisfied that it was for the interest of the trust that it should be done. But it was held that the petitioners would be allowed *a just compensation* for the use of the property while held by the receivers.

IV.

It was properly held in the court below that the claim of the Quincy Company for rental was not a lien superior in equity to mortgages on all the railroads and properties of which the receivers took possession.

Appellants say the Wabash Company with whom the Quincy Company had its contract, was insolvent, and on page 52 of his brief their learned counsel says:

"It (the Quincy Company) was an entirely solvent corporation whose only misfortune was that it had leased its road *to the insolvent Wabash.*"

And again on page 53, he says:

"The court undertook to continue the operation of the whole Wabash system for a double purpose: 1st, to fulfill *the duty of the Wabash to the public*: and, 2d, to preserve the system as a going concern *for the benefit of the Wabash owners or creditors.* What we say is, simply, that whatever expenses or losses were incurred in pursuing either or both of these two objects is chargeable *alone upon the Wabash.*"

The fallacy of the whole argument made by appellants' counsel is seen in the foregoing paragraphs. He insists, in the first place, that all rentals and interest, as well as all the other expenses of operating the lines of the system, ought to be paid *out of the estate of the Wabash Company*, and he, in the same breath, admits that the Wabash Company was insolvent and had no estate. If the receivers took possession of the Quincy Line subject to the payment of interest or rental, then they took possession of all the other lines of the system on precisely the same terms.

It is easy to assert, *that all rentals and other obligations contracted by the receivers in operating the system should be charged to the Wabash Company;* but counsel has never, at any stage of this proceeding,

pointed out an asset belonging to the Wabash Company which could be availed of by the court or its receivers for that purpose. The vice of the argument made for appellants consists in the assumption *that the estate of the Wabash Company was* in some way augmented by the appointment of receivers, when such was not the case. The receivers held the other lines precisely as they held the Quincy Line. All were subject to prior liens, none of which could be displaced without destroying contract rights, while *the interest of the Wabash Company* in the properties represented nothing of value.

Again, appellants say that when the court or its receivers operated the Quincy Line *for the accommodation of the public*, they were only discharging a duty *due by the Wabash Company to the public*. But surely that contention is not sound. The truth is, that when the Quincy Company constructed its road it was the Quincy Company that owed to the public the duty of operating it. So imperative was the duty of keeping the Quincy Road in operation as a going concern, that it could, if necessary, be done even at the expense of prior mortgagees. It is true that the Quincy Company sought to have that duty performed through the agency of the Wabash Company, and consequently it entered into a contract with the Wabash Company, in which the latter not only contracted to operate the road of the Quincy Company and discharge its duties to the public, but also agreed to pay the Quincy Company a rental in addition.

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But that agency failed. And the Wabash Company having become insolvent, and being no longer able to perform its contract with the Quincy Company, and having no longer any pecuniary interests at stake, it asked the court to take charge of and continue the operation of the Quincy line; and when the Court did so, it performed a duty due, primarily, from the Quincy Company to the public, and not a duty due primarily, from the Wabash Company to the public.

The Wabash Company owed a contract duty to the Quincy Company, but it was the Quincy Company that owed *to the public* the duty of continuing the operation of its road, and that was a duty it could not escape by making a lease *to the insolvent Wabash.*

The truth is, that in order to ascertain the equitable rights of the parties in this case, it must be borne in mind that the Wabash receivership was established at the instance of an insolvent company, and that after their appointment the receivers were mere custodians of a large number of railroads, all of which the Court had taken possession of, not in the interest of any particular creditor or party to the suit, *but for the preservation of all the properties and for the benefit of all creditors and all parties to the suit.*

Instead of having funds or being the immediate representatives of any party or parties who had funds, the receivers were without funds and the properties in their hands were not only incumbered with mortgages, but

burdened, as the record shows (page 110), with a preferential indebtedness superior to all mortgages, amounting to $4,417,491. Therefore, the receivers, instead of representing any substantial interests belonging to the Wabash Company, or having funds of that company upon which they could draw for the purpose of discharging the obligations of the Wabash Company to its various lines and subdivisions, were in a position *where they had to draw upon the various lines and subdivisions* for funds with which to discharge the preferential debts which the company had contracted in their operation.

There was, therefore, at the beginning, nothing out of which the Court could pay any receivership debts, nor was there any one party before the Court whose interests should be protected in preference to another, or whose interests ought, in equity, to have been taxed to preserve the interests of any other.

The theory of the bill on which the receivers were appointed was that the Court should preserve and operate all the properties, not in the interest of any particular line, but for the equal benefit of all the lines. The only available receivership funds were those derived from the operation of the property, and while earnings were to be used in paying the debts and liens resting upon the properties in the order of their priority, there was no equitable or just reason for saying one line was being operated for the benefit of another, or for saying that the

earnings of one division should be taken to satisfy *the mere contract obligations of the Wabash Company to another division*. Under such a receivership it could no more be said, with truth, that the branch or leased lines were being operated by the receivers *for the benefit of the main lines*, and that therefore the main line should be charged with the interest or rental due to the branch lines, than it could be said, with truth, that the main lines were being operated for the benefit of the branch lines, and that therefore the branch or leased lines should be charged with the interest due to the main lines.

After the Wabash Company became insolvent and the receivers were appointed, there were no contract relations existing between one line or set of lines, and another line or set of lines, which made it legal or equitable to tax one for the benefit of the other. Therefore it was the duty of the Court to distribute the earnings of the system, not in recognition or discharge of any contract obligations of the Wabash Company, but on equitable principles, giving to each creditor what he was justly entitled to according to his rank or class. If there was a class of preferential indebtedness which was prior in equity to rentals, or the interest on mortgage bonds, it was the duty of the Court to pay all in that class from earnings before it applied anything to rentals or interest on bonds. In paying those preferential claims the Court would act equitably, because it would be emanci-

pating each line in the system from an indebtedness which rested on all alike, and which was superior to all other claims.

But when it comes to taking the earnings from one line, or set of lines, to pay interest or rentals due to others, a different question is presented, because no one line or division had any contract rights as against any other line or division. *They all* had contract relations *with the Wabash Railway Company*, but they had none *with each other*.

The foregoing facts with respect to the receivership, the manner and purposes of its creation and the relations which the lines sustained to each other, must be borne in mind in all our endeavors to astertain their respective rights.

Let us inquire on what equitable principle the burden of paying the rental due on one line, should be saddled upon another line, without it can be first truthfully said that one line was used for the benefit of another, or unless those interested in the line to be charged were in some way obligated to pay such rental. We think it would be difficult for intervenors to designate the step taken or act done, in the course of this litigation by those holding bonds secured by mortgage on one set of lines, which would make it more equitable to charge the rentals due the Quincy Road as a lien on their lines, than it would be to charge the interest due on their lines as a lien on the Quincy Road.

When the Quincy Company constructed its line, it did so under an implied agreement that the road should be operated, and that its stockholders and bondholders would look for their dividends and interest to what might be left after the operating expenses had been paid. True, they afterwards entered into an unsecured personal contract with the Wabash Company, in which the latter company agreed to operate their road and pay them a rental. But after the Wabash Company had proved insolvent, on what principle could it be said that the bondholders or stockholders of the Quincy Line were entitled to draw upon the earnings of the other lines for their interest or rental, when neither the other lines, nor their earnings had been mortgaged or pledged to the Quincy Line, and when no one interested in the other lines had done any act or caused any order to be entered affecting or changing the rights of the parties as they stood at the commencement of this litigation, with no contract relations between them? If before the receivers were appointed, the rental due the Quincy Company was an unsecured obligation, by what process and at what time did that company become entitled to the moneys earned on the other divisions of the system, in preference to those holding bonds secured by mortgage upon the divisions earning the money? Why should the Quincy Company, that has no mortgage upon the other lines of the system or their earnings, be preferred to

those holding bonds which were secured by mortgage on the other lines and their earnings?

The record shows (page 110) that when the receivers were appointed the preferential indebtedness of the company amounted to $4,417,491, and that from May 29, 1884, the date on which the receivers were appointed, to the first day of August, 1885, the date on which the Quincy Line was surrendered to appellants, *the net earnings* of the whole system were only $1,012,857.39, or $3,404,633.61 *less than enough to pay the labor and supply claims and other preferential indebtedness of the Wabash Company.*

In addition to that, the record shows (page 82) that *the total earnings of the Quincy Line were $20,550.81 less than enough to pay its operating expenses.*

Now on what equitable principle should the other lines of the system be required to emancipate the Quincy Line from the lien of the labor and supply debts, make good a deficit of over $20,000 contracted in preserving and operating that property, and then be required to pay the Quincy Line its rental. Equity would not seem to require any one line to pay more than its due share of any debt for which all were alike holden. If equality is equity, why should those interested in the Quincy Line get their interest and also get their property free from all debts and liens, while those interested in the other lines were not only denied their interest and rentals, but were even compelled to take their properties

subject to the lien of a large unpaid balance due for labor and supplies?

If intervenors did not approve of the allegations in the bill, to the effect that it was better *for their line* that all the roads that had been brought together by the Wabash Company should remain together, why did they not, as parties to the suit, make their views and wishes known to the Court in some proper manner? And why did they not ask possession of their property when they knew the Wabash Company---the only party with whom they had any contract---had become insolvent, and when they knew from the reports of the receivers that the line was being operated at a loss instead of a profit? And why should intervenors now be heard to contend that their lines were being used for the benefit of the others, more than the others were being used for the benefit of theirs; and, on what equitable principle should the other lines now pay the Quincy Company a rental and have no similar claim on the Quincy Line for their interest and rentals?

The case of *Kneeland vs. American Loan Co.* (136 U. S.. 89), was one in which these precise questions were discussed and determined. In that case a railroad company that owned a railroad subject to prior mortgages acquired rolling stock on which it agreed to make certain payments. The railroad company afterward became insolvent, and at the instance of a judgment creditor a receiver was appointed who took possession

of both railroad and rolling stock. The trustee in the mortgages were made parties to the bills under which the receivers were appointed, and although they entered their appearance they neither objected nor consented to the appointment of the receivers. Under those circumstances, the owners of the rolling stock contended that as their property had been taken possession of and used by the receivers their claim for such use became a lien upon the railroad, superior in equity to the mortgages. After fully stating the facts in the case, the Court, in the course of its opinion, said:

"Upon these facts we remark, first that the appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this Court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a Court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a Court appointing a receiver could rightfully burden the morgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the Court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of

other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railway company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the face of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the Chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens. *Railroad Co. vs. Railway Co.*, 125 U. S., 658, 673. So that these interveners acquired no right of priority by virtue of their antecedent contracts of sale.

"But it is urged, and with force, that the Court did not allow contract price, but only rental, and the question is asked, may a court, through its receiver, take possession of property and pay no rental for it? If it may legitimately compel the operation of the railroad in the hands of its receiver, in order to discharge the obligations of the company to the public, may it not also, and must it not also, burden that receivership, and the property in charge of the receiver, with all the expenses connected with the operation of the road, together with reasonable rentals for the property used and necessary for the operation of the road? As to the general answer to these inquiries we have no doubt. A court which appoints a receiver acquires, by virtue of that appointment, certain rights and assumes certain obligations, and the expenses which the court creates in discharge of those obligations are burdens necessarily on the property taken possession of; and this, irrespective of the question who may be the ultimate owner, or who may have the preferred lien, or who may invoke the receivership. So if, at the instance of any party rightfully entitled thereto, a court should appoint a receiver of property, the same being

railroad property, and therefore under an obligation to the public of continued operation, it, in the administration of such receivership, might rightfully contract debts necessary for the operation of the road, either for labor, supplies or rentals, and make such expenses a prior lien on the property itself; and it is in reliance on this general proposition that the intervenors insist on an affirmance of the decree.

"But as against this we are confronted with these facts: The Court never made any order for the rental of this rolling stock, and the situation of all the parties during this four months' receivership was this: The railroad company, with its franchises for building and operating a railroad, was in equity, whatever may have been the location of the legal title, the owner of realty, subject to certain fixed mortgage indebtedness, and of personalty, the rolling stock in question, subject to certain fixed liens. The creation, in the first instance, of those liens gave to neither lienholder, as against the other, priority in payment otherwise than in respect to the property specially charged with those liens. The holder of the lien on the real estate could not insist that both the real estate and the personalty should be subjected to the payment of his debt before payment to the holder of the lien on the personalty of his claim out of the proceeds of its sale. Neither, on the other hand, could the holder of the lien on the personalty insist that his lien should be first paid out of any proceeds of the realty. Each was limited to his priority of right on the property on which his lien rested. Under those circumstances, neither the holder of the lien on the real or the personal property moving in the premises a general creditor of the common debtor invoked for the payment of his debt, the intervention of a court of equity and the possession of all the property charged with these two liens, and its operation with a view to the collection of his unsecured claim. The operation of the road during that receivership did not pay the operating expenses. May the holder of a lien on the real estate insist that

the deficiency be charged to the holder of the lien on the personalty, or that the latter shall become liable to the former for the rental of its property? Unquestionably not. Neither lienholder asking the aid of the Court, no obligation was assumed by either in respect to the management of the property as against the other. If the operation of the property seized by the receiver did not result in the payment of the operating expenses, and the common debtor was unable to pay, the burden of the deficiency is as properly cast upon the holder of a lien upon the personalty as upon the holder of a lien upon the realty; and when the Court, in the administration of the receivership, thereafter returns the personalty to the holder of the liens upon it, such lienholder must be content to be relieved from any burden for a *pro rata* share of the deficiency, and has no equity to claim that he shall be not only thus relieved, but that he may also charge upon the realty, to the detriment of the lienholder thereon, both the entire burden of the deficiency and compensation to him for the use of his property. Hence it follows that neither by reason of a contract of purchase of the rolling stock, nor by its use for four months at the instance of a general creditor, was any burden cast upon the holder of a lien upon the real estate for the non-payment of such contract price or the rental value. The Court therefore erred in charging rental value of the rolling stock during those four months as a prior lien upon the realty."

V.

Intervenors are not entitled to recover on the authorities cited by them, because the essential facts in this case are not like those in the cases relied on.

In order to determine whether the authorities relied upon by intervenors are applicable to or conclusive of

this case, it must be first ascertained whether the essential facts in this case are like those in the cases relied on.

In his brief, the learned counsel for intervenors has quoted from a large number of adjudged cases which we can not attempt to view hear in detail. On examination, however, it will be found that none of the courts have held more than is stated in the following propositions:

1st. It has been held that when assignees in bankruptcy, or statutory receivers—who may, *if they so determine*, *take a legal estate* in the leasehold—elect to enter as assignees, that they then become bound to pay the agreed rental and perform all the other covenants which run with the land. In such cases the parties take the leaseholds as assignees, and they are held liable *only* because of the *privity of legal estate* created between them and the lessors. To that effect are the following cases cited by appellants:

Williams vs. Bosanquet, 1st Br. & B., 238;
Thomas vs. Pemberton, 7th Taunt, 206;
Hanson vs. Stevenson, 1st B. & Ald., 303;
In re Oak Pitts Colliery Co., L. R. 21, Ch. Div., 330;
In re Lundy Granite Co., L. R. 6, Ch. Ap., 462;
In re North Yorkshire Iron Co, 7 Ch. Div., 661;
In re Silkstone & Dodworth Coal and Iron Co., 17 Ch. Div., 158;
In re S. Kensington Co-operative Stores, 17 Ch. Div., 161;
In re Brown, Bayley & Dixon, 18 Ch. Div., 649;
In re Progress Assurance Co. L. R., 9 Eq., 370;

In re Bridgewater Engineering Co., 12 Ch. Div., 181;
Dixon vs. Smith, 1st Swanst, 457;
Martin vs. Black, 9th Paige, 641;
In re Brown, Receiver, 3 Edwards, Ch., 384;
Hoyt vs. Stoddard, 2 Allen (Mass.), 442;
Boyce vs. Bakewell, 37 Mo., 492;
People vs. Universal Life Ins. Co, 30 Hun., 142;
Commonwealth vs. Franklin Ins. Co., 115 Mass., 278;
Ex-parte Faxon, 1st Lowell, 404;
In re Merrifield, 3 N. B., Reg. 98 (2d Ed.);
New Jersey and New York Ry. Co., 29 N. J. Eq., 67.

2d. It has been held that when courts of equity, at the instance of and for the benefit of certain creditors, appoint receivers over the property of A, and the receivers find that in order to preserve the property placed in their custody it is necessary for them to make leases or adopt those previously made for the use of property belonging to B, who is not a party to the suit or interested in the fund in court, that in so doing the receivers act as the agents of A and his creditors, and that—to the extent of their interest—the property of the receivership is bound for the payment of a *reasonable rental.*

To that effect are the following cases:

Fosdick vs. Schall, 99 U. S., 235;
Turner vs. R. R. Co., 8th Rep., 453;
Woodruff vs. Erie Ry. Co., 93 N. Y., 609;
Miltenberger vs. Logansport Ry. Co., 106 U. S., 286;
Kneeland vs. Trust Co., 136 U. S., 89.

In *Fosdick vs. Schall* (*supra*) it w as, among other things, held that where the receivers of a railroad, acting for the

benefit of those who were interested in the fund in court, and whose trustees had brought the suit, contracted for the use of rolling stock belonging to one not a party to the suit or interested in the receivership property, the owner was entitled to be paid for the use of his cars from the funds of those for whose benefit his property had been employed. In that case the cars were no part of the receivership property, they did not have to be used in order to be preserved, while in this case the railroad of intervenor was a part of the receivership property, and it had to be operated to preserve its franchises.

That case is not at all like this in principle. No one will contend that it would have been equitable to use the cars of one not interested in the receivership property for the benefit of those who were interested in it, without paying for their use.

So, in *Turner vs. R. R. Co.* (*supra*), the receivers used rolling stock belonging to one not interested in the receivership property with the knowledge and for the benefit of those who were interested, and the Court held as in Fosdick against Schall, that the owners of the rolling stock ought to be paid for its use by those in whose service and for whose benefit it had been employed.

In *Woodruff vs. Ry. Co.* (*supra*) a receiver was appointed over the property of the Erie Ry. Co. in a proceeding instituted under a State statute regulating the manner in which the affairs of insolvent corporations should be wound up. The Erie Company was, at the

time, lessee of the Erie & Genesee Valley Railroad, extending from Mount Morris to Danville, and the order appointing the receiver contained the following clause:

"It is ordered that in addition to the powers heretofore conferred upon the receiver in this cause he shall have power, and he is hereby authorized in the execution of a sound discretion, to pay any rent now due, or that may hereafter become due, under any lease now held by said Erie Railway Company, in manner and form as provided in such leases respectively. *But this order is not to be construed to require the receiver to adopt and confirm any such leases that upon due inquiry he shall find not to be advantageous to all parties in interest.*"

On the same day the above order was entered, the receivership, under the statute, was, at the instance of mortgage creditors, "extended" so as to cover their interest in the mortgaged property, *but the Erie & Genesee Valley Railroad was no part of the mortgaged estate, and its owner was neither a party to the suit nor interested in the receivership property*, and yet the receiver, with the knowledge of the mortgage creditors, elected, as he was authorized to do under the order of his appointment, to take possession of and use the road from Mount Morris to Danville, for the benefit of the mortgagees who were parties to the suit and knew of the order the Court had made and what the receiver was doing under it. On that state of facts the Court held that the receiver being authorized to determine whether he would or would not take possession of property belonging to one not a party to the suit, or interested in

the receivership property, and use it for the benefit of those who were so interested; and that having, under those circumstances, elected to take it, and having afterwards kept it with the knowledge and for the benefit of the mortgage creditors, the owners ought to be paid for its use out of any funds in the hands of the Court belonging to the mortgage creditors.

In *Miltenberger vs. Ry. Co.* (*supra*) a receiver was appointed at the instance of mortgage creditors over a mortgaged road. The order of his appointment only authorized him to take possession of the mortgaged property, which extended from Logansport to Rockville in the State of Indiana. But the mortgagor was at that time lessee of a line extending from Rockville to Terre Haute which belonged to the Evansville and Crawfordsville Railroad Co., which company was neither a party to the suit nor interested in the receivership property. Notwithstanding the mortgage under which the receiver was appointed did not cover the leasehold interest of the mortgagor in the line from Rockville to Terre Haute, the receiver, with the knowledge and for the benefit of the mortgage creditors, used the line from Rockville to Terre Haute; and under those circumstances the Court held that the owners of that line ought to be paid *a reasonable rental* out of any funds in the hands of the receivers belonging to the mortgage creditors.

The facts in all the foregoing cases differ from those in this in the following essential particulars:

First. In those cases the receivers were appointed at the instance, and for the benefit, of particular creditors; whereas, in this case the receivers were appointed at the instance of the insolvent debtor for the benefit of all the parties interested in its property, according to their respective legal and equitable priorities, and the receivership was beneficial to intervenors in preserving their property, discharging their duties to the public, and in emancipating their line from the lien of the preferential indebtedness.

Second. In those cases the owners of the leased properties were not before the Court and did not consent to anything; whereas in this case the lessors and mortgagees of all the lines were before the Court as parties to an equitable proceeding, and consented to the operation of their roads by the Court for their benefit long after they were, under their contracts with the Wabash Company, entitled to enter and take possession for themselves.

Third. In those cases there was a fund in court belonging to those at whose instance and for whose benefit the Court had appointed the receivers; while in this case there is no fund in court belonging to the parties at whose instance the receivers were appointed, nor is there any fund in Court to which intervenors have a superior equity as against the other defendants.

WELLS H. BLODGETT,
For Appellees.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No. 228.

THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY AND THEODORE GILMAN AND CHARLES H. BULL, TRUSTEES, APPELLANTS,

vs.

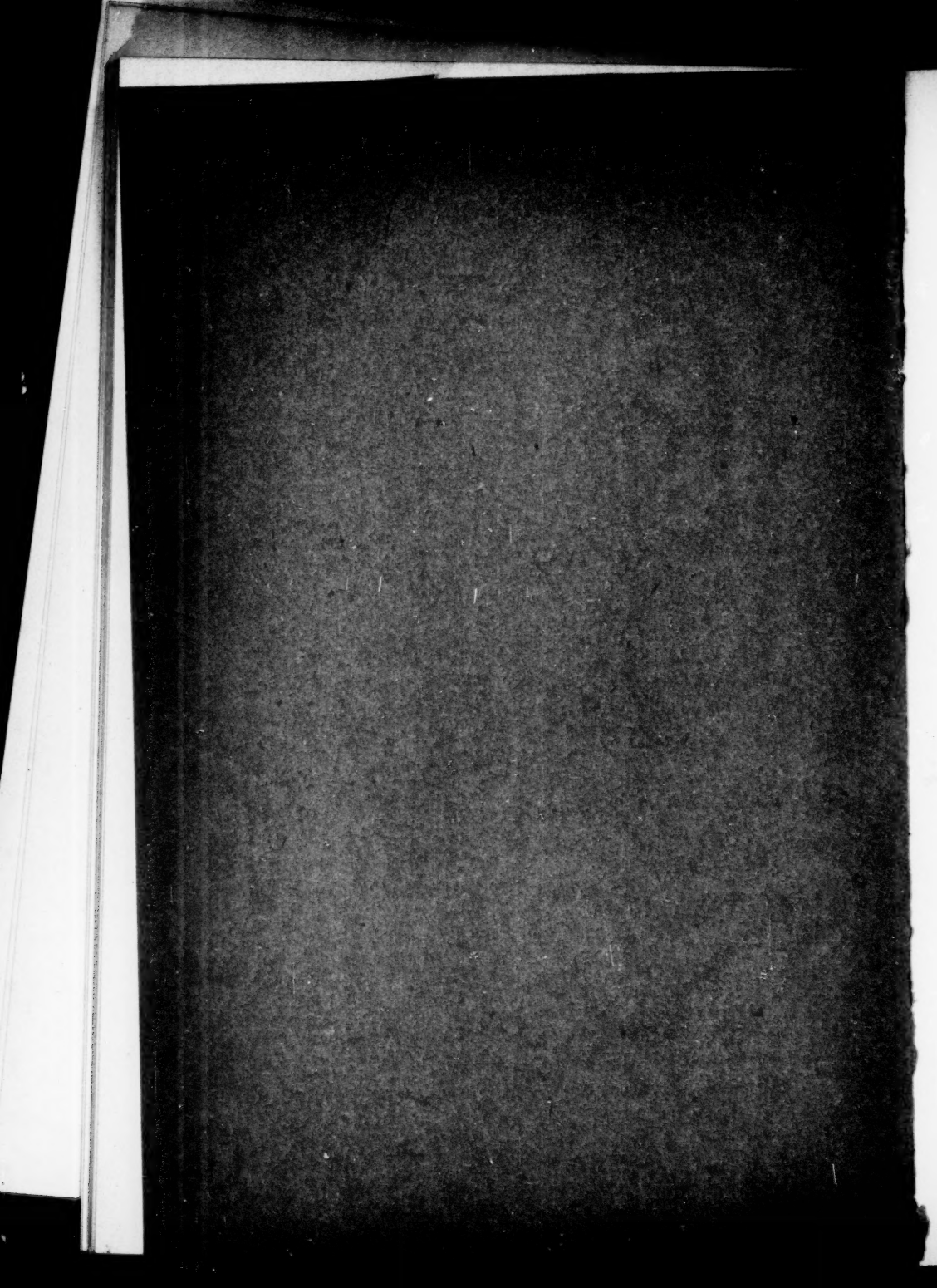
SOLON HUMPHREYS AND THOMAS E. TUTT, RECEIVERS OF THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT AND BRIEF FOR APPELLEES.

THOMAS H. HUBBARD,
For Appellees.

C. G. Burgoyne, Walker and Centre Sts., N. Y.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM NO. 223.

THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY and THEODORE GILMAN and CHARLES H. BULL, Trustees, *Appellants*,

VERSUS

SOLON HUMPHREYS and THOMAS E. TUTT, Receivers of the Wabash, St. Louis and Pacific Railway Company, *Appellees*.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

APPELLEES' REPLY TO ADDITIONAL BRIEFS OF APPELLANTS.

STATEMENT.

The Quincy, Missouri and Pacific Railroad Company was incorporated in the State of Missouri in 1869, and in 1879 had constructed about seventy-seven miles of

road, had issued mortgage bonds to the amount of $2,000,000, and owed, in addition to the principal of said bonds, "a very large amount of overdue interest accrued thereon" (Record, pp. 91, 92). Such being the situation, the Quincy Company entered into a contract under date August 21st, 1879, with the Wabash Railway Company. This contract was called a lease, but practically amounted to a merger of the lessor company with the lessee (46 Fed. Rep., p. 35). By its terms all the property of the Quincy, Missouri and Pacific Company was leased to the Wabash Company for a term of ninety-nine years, with provisions of perpetual renewals; a majority of the stock of the lessor company was to be transferred and a majority of directors in its board to be given, to the lessee; the lessor company was to borrow $125,000 from the lessee for the purpose of continuing its construction to Milan to a connection with the line of the Burlington and Southwestern Railroad (Record, pp. 11 and 15); the lessee company was authorized to extend the road beyond Milan to its contemplated terminus on the Nebraska State line. By the terms of said instrument a new mortgage was to be made covering all the property of the lessor company and securing bonds at the rate of $9,000 per mile. These bonds were to be used in retiring the bonds then outstanding and in providing for further construction. Preferred stock of the lessor company was also to be issued and used, in connection with the new bonds, to liquidate the outstanding indebtedness of the lessor company, then estimated to be about $600,000 (Record, p. 13). By the terms

of said instrument the lessee company agreed to set aside certain percentages of the gross earnings derived from operation of the lessor company's road, and to apply these percentages, first, to payment of interest on the new bonds, and, second, to dividends on stock. And the lessee company guaranteed to pay interest on said bonds in the event that the said percentage of gross earnings should be insufficient for that purpose. This interest is designated by the appellants as "rental."

The said instrument further provided that, if the principal of the bonds secured by said mortgage should become due in consequence of default in the payment of interest, the lessor should have the option to forfeit the lease and re-enter without process of law (Record, p. 14).

In pursuance of the terms of this instrument a mortgage bearing date October 1st, 1879, was made by the Quincy, Missouri and Pacific Company to Solon Humphreys and Orville H. Browning, as trustees, whereby all the property of the mortgagor, including leases and leasehold interests, was conveyed to said trustees to secure the payment of bonds to be issued at the rate of $9,000 per mile (Record, p. 5).

The mortgage provided that a default of six months in the payment of interest might be availed of by the bondholders as a cause for declaring all the principal of said bonds forthwith due (Rec., pp. 5, 6 and 7).

The Wabash Company received possession of the railroad of the Quincy, Missouri and Pacific Company, under the term of the instrument first mentioned, July 1st, 1880, nearly one year after the date of said instrument; and by

the 1st of July, 1881, had extended the road from Milan to Trenton, a distance of about thirty-one miles (Rec., pp. 92 and 94).

It appears that nine hundred and twenty-five bonds of the new issue had then been used to take up the earlier issue of $2,000,000, and to provide for additional construction. The inference is that the bonds of the old issue must have been valued at about thirty cents on the dollar, payable in bonds of the new issue (Rec., p. 94). The Wabash Railway Company, and its successors, the Wabash, St. Louis and Pacific Railway Company, operated the Quincy, Missouri and Pacific Road, under the arrangement above indicated, until May 29th, 1884.

On the 27th day of May, 1884, the Wabash, St. Louis and Pacific Company filed its bill in equity stating, in substance, that it was insolvent; that it had accumulated a floating debt for operation and maintenance amounting to $1,784,145; that it was about to make default in interest payments; that such default would be ruinous to all parties interested in its maintenance and its revenues, and that the interests of all creditors and bondholders would thereby be imperiled. The prayer of the bill was, in substance, that the Court would take possession of all the property, for the protection of all parties concerned therein, and that Receivers might be appointed with powers adequate to the occasion (Record, p. 40 *et seq.*).

Referring to the Quincy, Missouri and Pacific Company, the bill stated that Orville H. Browning, one of the trustees under its mortgage, was deceased, and prayed the appoint-

ment of a successor (Record, p. 51). Upon this bill an order was made May 27th, 1884, appointing Solon Humpheys and Thomas E. Tutt Receivers of all the railroads and property of the Wabash, St. Louis and Pacific Company. This order directed "that the said Receivers, *out of the income that shall come into their hands from the operation of said railroad or otherwise*, proceed to pay all balances due to other railroads or transportion companies, or balances growing out of the exchange of traffic accruing during six months prior hereto; that said Receivers *also in like manner pay all rental accrued or which may hereafter accrue* upon all leased lines of said complainant, and for the use of all the terminals or track facilities, and all such rentals or installments as may fall due from said complainant for the use of any portion of road or roads or terminal facilities, of any other company or companies, and also for all rentals due or to become due upon rolling stock heretofore sold to complainant and partially paid for; that said Receivers *also pay in like manner out of any incomes or other available revenues which may come into their hands* all just claims and accounts for labor, supplies, professional services, salaries of officers and employees that had been earned or have matured within six months before the making of this order" (Record, p. 54).

Under this order the Receivers qualified, and on May 29th, 1884, took possession of all lines of railroad which at that date were held or operated by the Wabash Company.

On the 26th of June, 1884—less than a month after their appointment—the Receivers petitioned the Court for advice

(Record, p. 56). In this petition they stated that from the incoming rentals and profits of the property they were unable to pay on the 1st day of June, 1884, interest falling due on three classes of bonds and dividend on a certain class of stock. This dividend was payable as rental for the Eel River Railroad, which formed part of the Wabash main line between Detroit and St. Louis. (Record, pp. 56, 57 and 61).

The petitioners further stated, in respect to twenty-eight different classes of bonds, that the earnings of the lines upon which they were secured had at all times been sufficient to meet interest payments (Record, pp. 57 to 61).

The petitioners further stated in respect to ten other classes of bonds, of which the bonds of the Quincy, Missouri and Pacific Railroad Company made one class, that none of the lines or divisions by mortgage of which said bonds were secured had at any time since their acquisition been sufficient to pay their operating expenses, cost of maintenance and interest upon said bonds (Record, pp. 62, 63). This petition was referred to a Special Master, who reported facts in accordance therewith and recommended an order. The said order provided that until otherwise directed the Receivers "*from the incoming rents and profits of said property after meeting such other obligations as they have been directed to discharge by the former orders of this Court, pay from whatever balance may remain in their hands the interest*" upon the bonds and obligations secured by mortgages on the several lines whose earnings had been sufficient to pay interest (Record, pp. 66 to 69).

The said order further provided that the Receivers, "until otherwise directed, keep separately the accounts of all the earnings and incomes from, as well as the accounts of all operating expenses, cost of maintenance and taxes upon" the lines which had not earned interest, including the Quincy, Missouri and Pacific Railroad. In respect to these lines the order also provided that the said Receivers should make quarterly reports showing, not only the income and expenses of each of the lines aforesaid, but also the methods by which the incomes and expenses of said lines were respectively ascertained. This report was confirmed by the Court (Record, pp. 69 and 70).

On the 15th of October, 1884, the Court in considering a petition made on behalf of one of the roads whose earnings had not been sufficient to pay interest, declared:

"I am not going to take the money that belongs to the underlying mortgages to pay interest on non-earning branches. If they have got to fail, they must fail. I will protect the underlying mortgages especially, and they haven't got enough here to do it" (Record, p. 74).

The Court also declared: "If that branch is earning enough to pay its own interest, that is another inquiry; but certainly I am not going to sit here and order that the earnings that belong to other branches in this consolidated system shall be taken to pay concerns that do not earn running expenses. Let them collapse" (Record, p. 75).

On December 16th, 1884, the Quincy, Missouri and Pacific Railroad Company filed an intervening petition, in which it stated its relation to the lines in the hands of the Receivers; stated that interest on its bonds was in default, and also stated "*that it has no means, property or moneys, aside from*

what is covered by said mortgage, and that it is without any means of paying said overdue and defaulted interest" (Record, pp. 91, 96, 97).

The petitioner further stated its belief that, if the default in the payments of interests on its bonds should continue, the bondholders would require the sale of the mortgaged property under the terms of the mortgage; that the petitioner, being so informed, had applied for information to the president of the Wabash Company and others of its officers to find out whether the said Wabash Company, or any one on its behalf, would pay or make provision for payment of said defaulted interest in time to prevent such foreclosure, but the petitioner had been unable to get from any person so applied to any information of any intention on the part of said complainant, or any one for it, to make such payment (Record, p. 97).

The petitioner further stated that a Missouri corporation known as the St. Joseph and Quincy Railroad Company was ready and willing to accept a transfer and assignment by the Wabash Company of the lease hereinbefore mentioned, and the residue of the term therein named, upon the following terms, that is to say: that the said St. Joseph and Quincy Railroad Company would, contemporaneously with the execution and delivery of proper instruments of assignment and transfer of the said lease and the property therein mentioned, pay off, satisfy and discharge each and every of the interest coupons then in arrears, and would also either pay off, or give proper and sufficient security for the prompt payment of, interest coupons about to mature on the 1st of

January, 1885, and would assume any and all liability resting upon the Wabash Company or to which it was subject by reason of the existence of, or under, said lease (Record, p. 98).

The petitioner therefore prayed an order directing a transfer of the lease on the terms set forth in the petition (Record, pp. 100, 101). This petition was answered by the Receivers and the Central Trust Company of New York (Record, pp. 102 to 106), and on the 16th day of April, 1885, the Court made an order granting the petition substantially in accordance with its prayer (Record, pp. 107, 109).

It does not appear by the record that this order was ever availed of or acted upon by the petitioner.

On March 20th, 1885, the Receivers filed a petition and submitted with it a statement showing in detail the earnings and operating expenses of all the branch and leased lines of the Wabash system from May 29th, when the Receivers took possession, to November 30th, 1884 (Record, pp. 82, 83). This petition showed that up to the date last mentioned the earnings of the Quincy, Missouri and Pacific Company had been less than its expenses by the sum of $10,201.93. The Receivers prayed orders with respect to future operation of said lines and concerning the payment of the respective rentals which the Wabash, St. Louis and Pacific Company had agreed to pay (Record, p. 84). Upon this petition the Court made an order April 16th, 1885, which was entitled "In the Matter of the application of the Receivers for the cancellation of certain leases" (Record, p. 85). By this order the

Court directed that "where any subdivision earns a surplus over expenses, the rental or subdivisional interest will be paid to the extent of the surplus, and only to the extent of the surplus" (Record, p. 87). The Court further directed that:

"Where a subdivision earns no surplus, simply pays operating expenses, no rent or subdivisional interest will be paid. If the lessor or the subdivisional mortgagee desires possession or foreclosure, he may proceed at once to assert his rights. While the Court will continue to operate such subdivision until some application be made, yet the right of a lessor or mortgagee whose rent or interest is unpaid to insist upon possession or foreclosure will be promptly recognized." * * * "Where a subdivision not only earns no surplus but fails to pay operating expenses, as in the St. Joseph and St. Louis branch, the operating of the subdivision will be continued, but the extent of that operation will be reduced with an unsparing though a discriminating hand, that, is, if a subdivision does not earn operating expenses and Receivers are running two trains a day, then lop one of them off; if they are running one train a day and still it does not pay, then run one train in two days. While the Court will endeavor to keep that subdivision in operation it will be made the burden of it to the consolidated corporation and to all the other interests put into that consolidated corporation, a minimum" (Record, p. 88).

By the same order the Court denied an application made by the trustees of what was called the general mortgage, for the extension of the Receivership to said mortgage, and stated

"As we look upon it, the Receivers are not Receivers for either party; they are simply the hands of the Court. In the process of the litigation the Court has taken possession of the property and holds it neither for the mortgagor nor

the mortgagee, and it matters not for the ultimate determination of the suit at whose instance the Receivers were appointed. They act for neither party; they represent neither party; they stand here simply as the hand of the Court holding the property for disposition at the end of the litigation and for the benefit of all" (Record, pp. 89 and 90.)

On the 15th of July, 1885, Gilman and Bull, then trustees under the mortgage of the Quincy, Missouri and Pacific Company, petitioned for the possession of that property. The petition was granted by the Court, and the Receivers were ordered to transfer and surrender said property to said trustees, on or before August 1st, 1885 (Record, pp. 111 and 112).

On the 8th of December, 1885, the said trustees Gilman and Bull filed the petition on which this controversy arises (Record, p. 4), and on the 12th of June, 1886, the Quincy, Missouri and Pacific Railroad Company united in the application which said trustees had made, by filing its separate petition (Record, p. 18.)

Both petitions prayed that the Court would make an order directing the Receivers to pay rental due on account of the lease of the Quincy, Missouri and Pacific Railroad Company, and that the Court would decree said rental to be *a "lien superior and paramount to all mortgages on all the property of the said Wabash, St. Louis and Pacific Railroad Company"* (Record, pp. 4 and 21). The amount of rental claimed by the trustees was interest on the bonds of the Quincy, Missouri and Pacific Company from January 1st, 1884, when interest was last paid by the Wabash Company, to

August 1st, 1885, when the Receivers delivered said road to Gilman and Bull. The Quincy, Missouri and Pacific Railroad Company claimed the same amount of interest, and in addition thereto $15,000 for repairs and $16,000 for taxes (Record, pp. 20 and 21).

On January 6th, 1886, a decree was entered foreclosing two mortgages upon the properties of the Wabash Company. These were known as the general mortgage and the collateral trust mortgage (Record, p 113). The Court found due upon the general mortgage the principal amount of $17,000,000, and for interest $2,132,753, up to December 1st, 1885 (Record, p. 124); and upon the collateral trust mortgage the principal sum of $10,000,000, and interest $1,109,268.80 (Record, p. 125). For payment of these sums the Court directed the sale of the mortgaged property, excluding, however, the property of the Quincy, Missouri and Pacific Company (Record, pp. 141, 142). The Court decreed that the sale and conveyance of the mortgaged property should not have the effect of discharging any part of said property from payment or contribution to payment of claims that had been or might be charged against the same, or the Receivers, by the Court making the decree or by any other Circuit Court exercising ancillary jurisdiction, or by any other Court to which any of the parties to said decree had been remitted, and that the property should be subject to be retaken, and, if necessary, resold, if the sums so charged or to be charged against it or said Receivers should not be paid within a reasonable time after being required by order of Court (Record, p. 146).

The mortgaged property sold for $625,000. (Record, p. 148).

The net earnings of the whole Wabash system from the time the Receivers took possession to the time when they surrendered the Quincy, Missouri and Pacific road was $1,012,857.39, which was $3,304,633.61 less than the amount of preferred debt ($4,417,491) excisting when the Receivers took possession (Record, p. 110).

The petitions of the trustees Gilman and Bull and of the Quincy, Missouri and Pacific Company were referred to a Master, who reported against the claims therein advanced (Report, pp. 23 to 26). Exceptions to this report were argued before the Circuit Court, and said exceptions were disallowed and overruled, the report of the Master was confirmed and the said petitioners were dismissed (Record, p. 27). The opinions upon which this order was made appear in the Record, pages 28 to 39.

POINTS.

I. The substance of the appellants' claim is that the sums they demand constitute "liens superior and paramount to all mortgages on all the property of the Wabash, St. Louis and Pacific Railroad Company" and should be charged on the corpus of the property in advance of said mortgages.

II. There is no equity in this claim to a charge upon the corpus of the property in preference to subsisting contract liens.

III. The claim cannot be sustained on the ground that the Receivers became assignees of the lease.

IV. The claim cannot be sustained on the ground that any act of the Receivers has already imposed this charge on the corpus of the property.

V. The claim cannot be sustained on the ground that any act or order of the Court has already imposed such charge upon the corpus of the property in preference to existing liens.

VI. In this case none of the grounds exist which have been recognized by courts of equity as sufficient to charge the corpus of receivership property and displace or defer mortgage liens thereon.

VII. The appellants argument to the effect that a priority should be given because the claim is "a receivership debt," is not well founded.

BRIEF.

I. The substance of the appellants' claim is that the sums they demand constitute "liens superior and paramount to all mortgages on all the property of the Wabash, St. Louis and Pacific Railroad Company," and should be charged on the corpus of the property in advance of said mortgages.

(*a.*) If the prayer that the Court would direct the Receivers to pay the sums mentioned in the appellants' petition is to be construed as a prayer that the Court would direct payment out of income only, then this prayer was properly denied because it had already been disposed of.

By the order of May 27th, 1884, appointing the Receivers, they were directed to pay rental for leased lines *out of the income that should come into their hands from the operation of said railroad or otherwise.* While this was not a specific direction to pay on any designated lien or at any fixed rate, it was authority for the Receivers to recognize the equitable claims of lessors to such extent as might be just and as the income of the Wabash system might warrant.

In their petition of June 26, 1884, the Receivers stated that the in coming rents and profits were insufficient to pay interest on certain bonds and to pay rental for the Eel River road (Record, pp. 56 and 57) and, by plain implication, that they had no income with which to pay rental on the Quincy, Missouri and Pacific (Record, p. 63). Indeed, the record shows that the existing preferred debt exceeded by several

millions of dollars all the income of all the property (Record, pp. 45 and 110).

The appellants' petition of December 16th, 1884 (Record, p. 91), shows that the Quincy, Missouri and Pacific Company then recognized the existing situation, understood that there was no income with which to pay its rental and that rental was not to be paid it, and was considering what course, if any, could be taken better than to leave its road in the hands of the Receivers.

It is manifest by this petition that counsel are mistaken in contending that the Quincy Company was satisfied with the situation, and supposed it had the promise of the Court to pay its rental claim.

The order of April 16th, 1885, reiterated what had already been declared by previous orders (Record, pp. 87, 88), and, in connection with the Receivers' petition on which that order was made, again notified the Quincy, Missouri and Pacific, and other lines in like situation, that there was no income applicable to the payment of their rental claims.

The decree of foreclosure, the sale which followed it and the orders for the Receivers to deliver possession of the property to its purchasers, together establish that the mortgage debt exceeded the value of all the property by many millions of dollars, and that any claims then remaining unpaid could only be satisfied by a charge upon the property, which would diminish, to the extent of such charge, the security of mortgage bondholders (Record, pp. 113 *et seq.*, 148 to 150.

The only effectual answer to this prayer for payment

would be an order charging the appellants' claim upon the corpus of the whole property in preference to mortgage liens.

(b) This was, in specific terms, the prayer made by the final clause of the appellants' petitions. The two clauses, in effect, were one, to wit: that the Court would decree, in favor of the appellants, a lien superior and paramount to all mortgages on all the property of the Wabash, St. Louis and Pacific Railroad Company. The question now presented to the Court is whether that prayer was properly denied, or whether, on the other hand, it should have been granted by the Circuit Court or should now be granted.

II. There is no equity in this claim to a charge upon the corpus of the property in preference to subsisting contract liens.

(a) The condition of the Quincy, Missouri and Pacific Company when the lease was made in 1879, as disclosed by the pages of the Record already referred to, was as follows:

The Company had about seventy-seven miles of railroad not finished to a connection with the Burlington; it had outstanding $2,000,000 first mortgage bonds, on which large amounts of interest were in default and unpaid. The amount of its debt compared with its mileage as well as the default on its interest payments show that the Company was then largely overburdened.

(b) Under the lease of 1879 the position of the Quincy, Missouri and Pacific Company was changed to this extent: It obtained from the Wabash Company a loan which enabled it to extend its road to a connection with the Burlington at Milan; its road was further extended by the Wabash Company, a distance of about thirty miles, to Trenton; its mortgage debt had been reduced from $2,000,000 to $1,204,000, and from this last-mentioned amount the extension of its road had also been constructed; interest on its bonds had been paid up to and including January 1st, 1884, and its road had been equipped and operated.

(c) When in May, 1884, Receivers of the Wabash properties were appointed, the situation of the Quincy, Missouri and Pacific, as shown by the record, was as follows: A majority of its stock was held under the terms of the lease, by or in the interest of, the Wabash Company, and a majority of its directors were chosen in the same interest; it was equipped, managed and operated by the Wabash Company; of its trustees under its mortgage one, Mr. Browning, was deceased; the other, Mr. Humphreys, was one of the Receivers appointed by the order of May 27th, 1884.

It is manifest, therefore, that at the moment of their appointment the Receivers Humphreys and Tutt would have looked in vain for any one to whom to surrender the Quincy, Missouri and Pacific Road had they been ordered to make that surrender. It is manifest that the road must either have continued for a time in the management of the Wabash Receivers, or its operation must have ceased.

The Court, by its order of May 27th, recognized the right of the Quincy, Missouri and Pacific to receive some fair rental out income; but there was no income.

By the order of June 28th, 1884, and by subsequent orders, the Court recognized the right of the company to have its own earnings and expenses separately accounted for.

In fact, the Receivers maintained the property until August 1st, and operated it at a loss of $20,550 (Record, p. 82), and when on August 1st the property was surrendered by the Receivers it was free from any charge for any part of the immense preferred debt which rested upon the whole Wabash system.

(d) It would appear that the Quincy, Missouri and Pacific Company should have been satisfied with this treatment, and that it should have been quite content to have its road maintained by the Receivers at a cost exceeding its total earnings and delivered to the trustees of its mortgage free from all liability for the Wabash debt and as soon as they were ready to receive it. But the appellants, not content that the other lines of the Wabash should have borne this burden and should provide for the total preferred debt of the Wabash system, ask that the Receivers or the other interests should pay for the privilege of preserving their unprofitable property, and that interest on bonds secured by a mortgage on the Quincy, Missouri and Pacific line should be charged upon other lines as a lien superior to the mortgages on those other lines. In effect, the appellants' position is that while

other claimants and other lines must endure all the loss incurred by the Wabash system, the Receivers of that system were in some way committed to pay to this particular line an unearned profit until the lease of ninety-nine years should be terminated. It is submitted that this claim on its face is inequitable, and should not be allowed unless the Court is constrained thereto by some inexorable rule of law.

III. The claim cannot be sustained on the ground that the Receivers became assignees of the lease.

(a) In the principal brief already filed by the appellees it is shown that chancery Receivers do not take the legal title of leasehold property by entering upon the property, and that the rule for which the appellants have contended is limited to statutory Receivers. It may be properly added that the Receivers Humphreys and Tutt did not enter upon what was described as the leasehold property, in the sense contemplated by the decisions which treat such an entry as an election to become assignees of the lease, and to adopt its terms. As has already been shown, the Receivers continued to manage this road as part of the Wabash system, because there was no other alternative save to abandon the road and let its operation cease. Such a course, as was pointed out by the Court in the case in 46 Federal Reporter, page 26, cannot properly be treated as a technical entry or as an election to be bound by the terms of the lease.

(b) If the Receivers had entered and had become committed to the terms of the lease, it would not follow that their obligation for rental would become a preferred debt, secured by a lien upon the Wabash lines, superior in right to the mortgages upon those lines.

The counsel for appellants cite numerous cases of liquidation under the English Companies Act and of assignments in bankruptcy, to show that liquidators and assignees who have elected to occupy leased premises must pay the rental therefor "out of the fund" or out of "the assets" of the estate. But what is "the fund," and what are the "assets," in such cases? The meaning of the cases cited is that rental must be preferred to unsecured debts and must be paid before general distribution to unsecured creditors. The fund and the assets are the net proceeds or avails of the estate in liquidation or in bankruptcy; but while that estate would include the equity of mortgaged premises, it would not include the value of property within the limits of valid mortgages or pledges. Suppose, for example, that the assets should consist of a leasehold estate subject to arrears of rental, and mortgaged or pledged property just sufficient, or insufficient, to pay the face of the pledge or mortgage, and not sufficient to extinguish interest accrued thereon. Does any case declare, or can it be successfully contended, that because a liquidator or an assignee in bankruptcy has become committed to the terms of the lease, he must pay the accrued rental from the proceeds of the mortgaged property, and that while the lessor in this manner gets his rental in full, the pledgee or mortgagee goes

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without his interest and loses part of the security for his principal? Not only does no case go to this length, but, on the contrary, the tenor of the cases is that the liquidator is as much bound to pay interest where he has occupied mortgaged premises as he is bound to pay rental where has occupied leased premises.

The citation found at page 11 of appellants brief:

> In *re Brown, Bailey and Dixon, L. R., 18, Chancery Div.*, 649,

is exactly this case, where the liquidator of an insolvent mortgagor remained in possession of mortgaged premises, and the mortgagee was allowed to distrain for interest.

Under this authority and according to appellants' argument, the Receivers, Humphreys and Tutt, were bound to treat unpaid interest on the mortgage and the appellants' rental claim, as Receivers' obligations on the same footing. If they could pay rental out of property covered by mortgage to another, they could also pay interest out of property not covered by the mortgage. The fact was that, having no income to pay either, the Court allowed each—lessor and mortgagee—to get what he could from his own property.

It is not contended here that no circumstances can exist under which rental will be charged on the corpus of property held by Receivers. The contention is that rental is not so charged from the mere circumstances that a Receiver has entered upon or held the leased property, even though he has held it under the terms of the lease.

The term "Receiver's debt" has not yet been strictly defined, but it is certain that all Receivers' obligations are not

charged on the corpus of the property so as to displace contract liens or diminish vested rights.

IV. The claim cannot be sustained on the ground that any act of the Receivers has already imposed this charge on the corpus of the property.

(a) The Receivers have done no act to commit them to the terms of the lease or to charge them with the rental fixed by its terms. Even if the fact had been that the Receivers had thought it desirable to hold this property, they would have had a reasonable time to make their election. The fact is that before one month had elapsed they applied to the Court for instructions, by a petition which distinctly set forth that they had no income wherewith to pay the rental in question, and the order of the Court, made on that petition, and under which the Receivers thereafter acted, was notice to the Quincy, Missouri and Pacific Company and its trustees that the Receivers were not to be bound by the limit of rental prescribed by the lease, or, in other words, that they did not elect to adopt the terms of the lease. At most, the Receivers did "nothing except abstain from trying to get rid of the property which the company held as lessee." This is not an "election."

In re Oak Pitts Colliery Co., L. R., 21 Ch. Div., 330.

The petition of December 16th, 1886 (Record, p. 91), shows that the appellants so understood.

(b) The Receivers had no power to invest this claim with the character of a preferred claim, or give it security by a charge upon the property in their possession. Such a charge can only be imposed by special authority of the Court. An order to pay operating expenses out of income is plainly insufficient. The Receiver cannot himself charge the corpus of the property; he is closely restricted to the income and profits.

Beach on Receivers, Sec. 377, and cases there cited.

V. The claim cannot be sustained on the ground that any act or order of the Court has already imposed it as a charge upon the corpus of the property in preference to existing liens.

(a) The appellants have contended that the order of May 27, 1884, was an absolute and unqualified promise by the Court that their claim should be paid. In support of this contention they quote some words of the order. But the order, when correctly read, is found to be in terms *an order for payment out of income only.*

(b) The order of June 28th, 1884, which approved the Master's Report upon the Receivers' petition of June 26th, was a distinct declaration that while each separate line of road was accorded the right to have its account of earnings and expenses separately kept, yet the expenses of one line

should not be paid from the earnings of another, and is a sufficient repudiation of the suggestion that the Quincy, Missouri and Pacific Company had a right to rely on payment by the Receivers under order of the Court.

The declarations of the Court in its opinion delivered October 15th, 1884, were in the same line as the decision of June 28th, and emphasized that decision.

(c) The appellants in argument and in their briefs have treated the order and decision of April 16th, 1885, as a declaration that while rental would not be paid upon this line unless earned by it, yet that the Court would not permit the cancellation of the lease, but would continue to hold and operate the line.

The appellants argue that the Receivers' application was in terms for the cancellation of certain leases, and that the Court, instead of ordering their cancellation, said it would continue to operate the roads. The record shows that it is the order, and not the petition, which is entitled "In the Matter of the Application of the Receivers for the cancellation of certain leases," and the language of the Court is: "While the Court will continue to operate such subdivision *until some application be made*, yet the right of a lessor or mortgagee, whose rent or interest is unpaid, to insist upon possession or foreclosure, will be promptly recognized." The fair construction of this decision is that the Court declined to cancel leases *on the application of the lessee without the consent of the lessor.* This was right, because, obviously, when the lessee defaults upon his rent,

it is not his privilege also to repudiate the lease, but the right to do so, or not to do so, belongs to the lessor. The Court declared that it would continue to operate such subdivision "*until some application be made,*" and this declaration was wholly in the interest of the lessor companies. In this respect the gist of the decision is that the Court will not relieve a defaulting lessee (the Wabash Company) from the obligations of the lease without the consent of the lessor, and will not allow the Receivers to cease operating roads which must be kept running in the interest of the public; but that whenever the lessor prefers to take charge of the leased property, rather than to leave it in the hands of the Receivers, his right to do so will be promptly recognized.

It is quite evident that the order was understood in this sense by the Quincy, Missouri and Pacific Company at the time when it was made; for on the same day the application of that company to have its line turned over to the St. Joseph and Quincy Railroad Company was granted (Record, pp. 107, 109). It does not appear why the permission thus granted was not availed of, but the fair inference is that the experiment which the Quincy, Missouri and Pacific Company was then making, in respect to a new management for its line, failed, and that in consequence of this failure neither the company nor the trustees under its mortgage were prepared to take possession of their line until July 15th, when they filed their petition asking its surrendered to the trustees.

VI. In this case none of the causes exist which have been recognized by courts of equity as sufficient to charge the corpus of receivership property and displace or defer mortgage liens thereon.

(*a*) The grounds upon which courts of equity have imposed certain obligations of Receivers upon the corpus of property, and have postponed to such claims the rights of lien creditors, are, in substance, either that earnings applicable to the payment of such claims have been diverted to some other channel or that the claims have originated in operations conducted under the orders of the Court for the protection and preservation of the property in its charge, or that the mortgagees, to whose rights such claims have been preferred, have assented to the preference and have expressly or by implication asked the Court to allow it.

Burnham vs. Bowen, 111 U. S., 776.
Wallace vs. Loomis, 97 U. S., 146.
Kneeland vs. Am. Loan & T. Co., 136 U. S., 89.

(*b*) Neither ground exists in this case. The rental on the Quincy, Missouri and Pacific had been paid up to and including January 1st, 1884. During the same period an immense floating debt for supplies and other claims of a preferential character had accrued. The inference is that, if there was any diversion, it was a diversion of funds from the payment of supply claims to the payment of rental claims. Again the rental charge here claimed was not an expense

originated by the Court in the process of administration, like the Receivers' salary, for example. Nor was this road operated for the protection of the other lines. The Court took the property as it found it and maintained and operated it for the benefit of the lessor until the lessor was prepared to take it. As soon as the lessor was ready to take it, the Court ordered its surrender. Meantime the property was operated at a net loss to the Receivers and was not charged with any portion of the Receivers' debt. It is claimed in the appellants' argument that this rental was an operating expense. An operating expense would naturally cease when operation ceased. But rental under a lease would go on whether the leased property were operated or allowed to lie idle. The rental was in no correct sense an operating expense, and such was the decision of the Court in 46 Federal Reporter, page 26.

The record shows that the mortgagees did not, expressly or impliedly, consent to have this rental claim charged upon the property in preference to their mortgages. The Receivers were not appointed at their instance. Their application to have the receivership extended to their mortgage was denied. The Court expressly held that the Receiver was acting as the arm of the Court, not in the interest of any party, but for all parties. It is the very reverse of the case where a mortgagee of real estate has asked to have Receivers take charge of the real estate, and also of leased personal property used in connection with and for the benefit of the real estate.

VII. The appellants' argument, to the effect that a priority should be given because the claim is "a receivership debt," is not well founded.

(a) The counsel for appellants maintain that, if this debt is a Receiver's debt, then of necessity it becomes a charge upon the corpus of the property if income for its payment is lacking. This, it is submitted, depends upon the question *what kind of Receiver's debt or Receiver's obligation is the claim.* It is true that Receiver's debts of the class originated under orders of the Court for the protection and preservation of the fund in charge of the Court, have this preferential character. But there are many Receiver's obligations which have not such a preference. Whether they should be called "Receiver's debts" or "Receiver's obligations" is a question of terms which, perhaps, has not been distinctly answered by any adjudicated case. In the case of

St. Louis, Alton and Terre Haute Railroad Company vs. Cleveland C. C. and I. Railroad Co., 125 U. S. Rep., 658, p. 668,

it is held that the rule charging operating expenses on gross income in preference to mortgage interest does not apply to the fund realized from the sale of the road, and that, as a general rule, the mortgage debts take precedence. The case of

Illinois Midland Railroad Co. vs. Union Trust Co., 117 U. S. Rep., p. 434,

was to some extent devoted to the classification of

Receiver's obligations, and it was there held that two items ($54,900 and $32,000) might be allowed as *indebtedness contracted by the Receivers*, but were subordinate to the mortgage bonds.

It is familiar practice to classify Receivers' debts; and even Receivers' certificates issued under the order of the Court are sometimes disallowed, or restricted, as liens upon certain parts only of the property in possession of the Court. It is sufficient, for the purposes of this case, to say that the appellants' claim has been recognized by the various orders of the Court as a claim or obligation entitled to consideration, and with reference to which, separate accounts of the earnings of the road in question should be kept. The Receivers were not instructed to ignore the claim. It was treated like claims presented to and filed with Receivers, but which there is no fund to pay. It was *the claim to a preference over mortgage debts and a lien or charge upon the corpus of all the mortgaged property*, which was denied, and, it is submitted, was properly denied, by the Court.

The character of a claim is not to be determined by putting a label upon it. If the character of the appellants' claim is correctly set forth in this brief, it cannot be advanced by calling it "a receiver's debt," or postponed by calling it "an obligation."

It may be necessary to define with more precision than heretofore the term "*receiver's debt*," but we respectfully submit that no decision yet made justifies the appellants

position that the claim in question should outrank all mortgage liens, or that a change of names is a change of things.

VIII. The decree appealed from should be in all things confirmed.

THOMAS H. HUBBARD,
For Appellees.

Office Supreme Court U. S.
FILED.
MAR 30 1892
JAMES H. McKENNEY.
CLERK.

SUPREME COURT OF THE UNITED STATES.

QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY,
Appellants,
vs.
SOLON HUMPHREYS AND THOMAS E. TUTT, RECEIVERS, &c.,
Defendants

No. 223.
OCT. TERM, 1891.

Brief for Reversal Filed by Leave of the Court.

JAMES THOMSON,

Of Counsel for PHILIP HENRY BROWN AND JOHN PATON, *Trustees* of TOLEDO, PEORIA AND WESTERN RAIL ROAD COMPANY, *Lessors.*

SUPREME COURT OF THE UNITED STATES.

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SOLON HUMPHREYS AND THOMAS E. TUTT, Receivers, &c.,
Respondents.

No. 223.

October Term 1891

Brief

on liability of the Wabash Receivers for rental of leased lines.

This case is one of several in which the liability of Solon Humphreys and Thomas E. Tutt, receivers of the Wabash, St. Louis and Pacific Railway Company, for rental of lines leased to the Wabash Company, and taken possession of and operated by said receivers, under the order appointing them, is sought to be enforced.

The suggestions in this brief are made primarily in the interest of Philip Henry Brown and John

Paton, trustees of the first mortgage of the Toledo, Peoria and Western Railroad Company, who claim against the receivers for the rental of the road of the last named company during the period of its operation by the said receivers.

The case of the T. P. & W. trustees is pending in the Circuit Court of the United States for the Northern District of Illinois. Decree for the amount of the rental claimed was entered against the receivers. The receivers filed a petition for a rehearing, and after argument an order was entered by the court, stating that the court "grants such "application for rehearing, and orders and decrees "that the decree of July 5. 1888, entered in this cause "in favor of said complainants and against said "Humphreys and Tutt, receivers, and said Wabash, "St. Louis and Pacific Railway Company, be and "the same is upon such application for rehear- "ing opened, vacated and set aside, and leave is "given complainants to file such amended and "supplemental pleadings as they may desire, and "as shall be consistent with equity and make "such other parties defendant as they may be "advised."

The language of the order is given, as it was subject of question upon the hearing in this cause in this court as to whether or not the rehearing in the case referred to was granted, except in relation to the want of certain amended and supplemental pleadings, and for want of the presence of other parties not then before the court, viz. the Wabash purchasing committee.

Statement.

The bill filed by the Wabash Company was without precedent. After stating the formation of the Wabash system, and the conditional tenure upon which a number of the roads constituting that system as well as a portion of the rolling stock and equipment by which it was operated, were held by the Wabash Company, its insolvency and an impending default in the payment of an instalment of interest on its General Mortgage bonds, it alleged among other things, that numerous suits would follow such default, *that the owners of the property held by it conditionally would declare forfeitures*, that thereby its system would be broken up beyond remedy and could not be again operated *as a unit*, that the trustees of its General Mortgage could not file a bill for its foreclosure under which receivers of its property might be appointed until three months after the default in the payment of interest on its bonds, during which time the consequences which it desired to avoid might happen, and it prayed the appointment of receivers of its property.

On said bill an order was made, May 27. 1884, which, after reciting the prayer of the bill for the appointment of a receiver or receivers, with power to take possession of, manage, operate, control and preserve all the railroads owned, operated or leased by the said complainant, and also all property of every description, real, personal and mixed, and all rights, credits and choses in action of the said complainant, whether situated within the said Eastern District of Missouri or elsewhere, and that the complainant had shown that there was great danger of loss, waste and destruction of the property of complainant, or valuable parts thereof, ap-

pointed receivers of the railroads and all the property of the complainant, and *directed the receivers*, among other things, *to pay out of the income that should come into their hands, from the operation of said railroads or otherwise, all rental accrued, or which might thereafter accrue, upon all leased lines of the complainant.*

This order was made without notice to any one except the trustees of General Mortgage.

Ancillary bills were also filed in the various courts within whose jurisdiction any part of the Wabash property was situated, in which the appointment of the receivers as receivers of the property of the Wabash Company was alleged, and their appointment as ancillary receivers was prayed, for the purpose of enabling them to reduce to possession the property of the Wabash Company. On these ancillary bills, the order appointing the receivers was made the order of the respective Circuit Courts. These orders were likewise made without notice.

Later, and in the action instituted by the Wabash Company, a cross bill was filed by the Central Trust Company, and James Cheney, the trustees under its General Mortgage, for a forecolsure of that mortgage.

Doubts having arisen of the jurisdiction of the Circuit Court for the Eastern District of Missouri to entertain the Wabash suit originally, the trustees under the general mortgage instituted actions of the courts of the respective States, for the foreclosure of that mortgage. These actions were subsequently removed to the Federal Courts of the district in which they were respectively pending, and consolidated with the actions already

pending therein instituted by the Wabash Company.

Upon their appointment the Wabash receivers entered into possession of the various leased lines forming part of the Wabash system, including the Quincy Missouri and Pacific Railroad and the Toledo, Peoria and Western Railroad and operated them.

The final decree entered in the Wabash action at September Term 1885, contained the following provisions in regard to the leased lines.

"It is adjudged by the Court that the lien of the "general mortgage on any leasehold interest or "other conditional interest held or owned by the "Wabash Company in or to any line or lines of "railroad, or any property, rights or franchises, "shall not be held to impair the right of the lessor "or lessees of such line or lines, or the person or "persons under whom the said line or lines were "conditionally held by the Wabash Company to "terminate any such lease or conditional interest "because of any breach of the terms on which the "same was granted to said Wabash Company.

"The declaration herein of a lien on such property in favor of said general mortgage shall not "be held to revive any leasehold or conditional "title in said Wabash Company in any instance "when the same has been heretofore lawfully "terminated, or to prevent any future termination "thereof for the breach of any condition for which "such lease or interest might be otherwise lawfully terminated or forfeited; and in all cases "when any line or lines of railroad have been, by "order or decree of Court, surrendered to the "trustee or trustees in underlying and senior mortgages, or to any receiver or person appointed by

"the Court in whose jurisdiction the property is "situated, the said leases under which such line or "lines were formerly held by said Wabash Com- "pany shall be, and are hereby adjudged and de- "creed to be lawfully terminated" (pp. 52–53).

"And it is hereby ordered, adjudged and decreed, "that the following named lines of railway, here- "tofore, by order of this Court, severed from the "Wabash system and surrendered to the trustees "in underlying and senior mortgages or to some "receiver, person or persons, appointed by the "Federal Court in whose jurisdiction said lines are "situated, to wit, * * * * the Quincy, Mis- "souri and Pacific Railway * * * the Toledo, "Peoria and Western Railway * * * * * shall "not be sold at said sale, nor shall any interest in "said lines or any or either of them pass by the "sale herein provided for, but the complainants "herein and all persons interested in said lines are "hereby remitted to the said several Federal "Courts in whose jurisdiction said lines are situ- "uated for the adjudication and settlement of their "respective claims and interests (pp. 56, 57).

"It is further adjudged that, in order to enable "the purchasers of said lines of railroads and "property, to raise the means necessary to dis- "charge all claims, debts and demands equitably "chargeable against the same in preference to said "bonds, by the use of the securities of the new cor- "poration intended to be organized to take said "lines of railroad or the chief part thereof, if such "purchasers shall make such cash payments as the "court shall require and order, and discharge the "remainder of their bids respectively by the pay- "ment of cash, or the use of bonds, as aforesaid, "such purchasers shall be entitled to the convey-

" ance and assignment of the property purchased
" by them, and each of them, as hereinbefore pro-
" vided. But such conveyance or assignment shall
" not have the effect of discharging any part of said
" property from the payment, or contribution to
" the payment, of claims or demands chargeable
" against the same, whether for costs and expenses,
" the expenses of the receivership of said property
" and the full payment of all the debts and liabili-
" ties of said receivers, or upon intervening claims
" allowed, or to be allowed, or upon any other
" claims or allowances that have been, or may be
" charged against said property, or any part there-
" of, or said receivers, either by this court, or by
" any other Circuit Court exercising ancillary
" jurisdiction, or by any other court to which any
" of the parties hereto, including the receivers,
" have been hereby remitted in proceedings or ac-
" tions ancillary hereto or otherwise.

" Nor shall such conveyance, transfer or assign-
" ment withdraw any of said railroads, property or
" interests to be sold under this decree as herein-
" before directed from the jurisdiction of this and
" the other courts aforesaid, but the same shall re-
" main in the custody of the receivers until such
" time as the court shall, on motion, direct said
" property, in whole, or, from time to time, in part,
" to be released to said purchaser or purchasers, or
" any of them, and shall afterwards be subject
" to be retaken, and, if necessary, resold, if the
" sums so charged, or to be charged, against
" said property, or any part thereof, or said re-
" ceivers, as aforesaid, shall not be paid within a
" reasonable time after being required by order of
" this or said other courts.

" The conveyance and transfer of said property

" shall be subject to the power and jurisdiction of " said courts, and the purchasers of any part of " said property shall thereby become and remain " subject to said jurisdiction so far as necessary " to the enforcement of this decree. And such " jurisdiction shall continue until all the claims " and demands that have been or may be allowed " against said property, or any part thereof, or said " receivers, by order of said courts, shall be fully " paid and discharged. The provisions aforesaid " shall apply to the purchasers at said sale and to " all persons taking said property through or un- " der them (pp. 64–66).

" All claims and demands against said property " or said receivers, or the proceeds of said sales, " not hitherto or herein adjudged and determined, " whatever the character of such claims and de- " mands, are hereby reserved for future action, by " this and said other courts " (p. 67).

I.—The receivers are liable for the rent of the leased property during their possession thereof.

(1.) *At the time of the appointment of the defendants, Humphreys and Tutt, as receivers of the Wabash Company, the legal relation between that company and the Quincy and Missouri Railroad Company, was that of lessor and lessee, and, upon their qualification as receivers, Humphreys and Tutt, became possessed of the entire property of the Wabash Company, including its leasehold interest in the Quincy and Missouri Railroad.*

The Wabash Company had the possession of and operated the railroad by virtue of a lease, and their estate was that of lessee. When the Wabash Company applied for and obtained the appointment of receivers of its property, the property of that company passed under the order appointing them into the possession of the receivers, and the receivers could elect within a reasonable time whether they would continue to operate the road under the lease, *i. e.*, become practically assignees of the lease, or renounce the possession and use of the road and surrender it to the company, and terminate the lease.

The receivers were the only persons who had the power of election; the covenants of the lease having been performed up to that time and no instalment of rent being due and unpaid, there was no right or power in the lessors to declare the lease terminated and re-enter. They were compelled to stand idly by and see their property pass into

the possession and control of the receivers without let or hindrance on their part. They could take no action when there was no default in payment of rent under the lease, or in the observance or performance of the covenants and conditions contained in it.

2. *The receivership of the Wabash Company was a receivership of the property of that company only, and did not extend beyond the interest of that company in the leased lines and such interest was a leasehold interest merely.*

"The possession of a railroad and its equipment "which is taken by a receiver, under an appoint- "ment by a court, changes no right of ownership "of any part of the property, perfects no title to "any part, gives no new or added right to any part, "changes no contract regarding the ownership of "any part, but is merely a holding by the same "title, subject to the same contracts, limitations "and conditions under which the railroad company "held the property at the time of such appoint- "ment."

See Edwards on Receivers, pp. 3, 4, 12, 165.
2 Daniell's Chancery, 28, § 3.
Hyde vs. *Lynde* (4 Comst., 387).
Kip vs. *Harwood* (3 Atk., 564).
Montgomery vs. *Merrill* (18 Mich., 338).
Portman vs. *Mill* (8 L. J. N. S., 165).

The receivership sought for by the Wabash Company was only a receivership of its own property.

The allegations of the bill leave no doubt of its limited scope.

The application of the Wabash Company upon

this bill was for the appointment of a receiver or receivers, with power to take possession of, manage, operate, control and preserve all the railroads owned, operated or leased by it, and also all property of every description, real, personal and mixed, and all rights, credits and choses in action of the said Wabash Company.

The application was of necessity limited to the property of the Wabash Company; the character of its title was not material; whether its right to possession depended upon its ownership, upon a traffic contract, or upon a lease, that right and title, whatever it might be, was transferred to the court to be preserved and protected through receivers appointed by the court.

Of all the property for which a receiver was sought to be appointed, the Wabash Company was in possession, and as that company voluntarily submitted itself to the jurisdiction of the court, the court may possibly have had a right to transfer that possession to its receivers.

But the possession so transferred was merely the possession of the Wabash Company If the possession of the Wabash Company was the possession of owners, so was the possession of the receivers; if it was that of managers, so was that of the receivers; *if it were that of lessees only*, so *was that of the receivers*.

This statement is strengthened by the facts that the order for the appointment of the receivers was made practically *ex parte*, and that, by its selection of receivers, the court simply continued the Wabash Company in possession of its property free from interference by its creditors. If a receivership of the whole property of the lessors was intended, the

order would have been, as a judicial act, without excuse, as it would have been without precedent.

A debtor cannot file a bill for the payment of its creditors out of property which the debtor does not own, out of interests which are not the property of the debtor.

The bill filed by the Wabash Company was practically one for the surrender of *its own* property and the distribution of that property among *its* creditors.

The only interest in the leased lines which the Wabash Company could devote to such a purpose was the *leasehold interest*. It could not put the court in possession of more than it had.

American Bridge Co. vs. *Heidelbach*,
94 U. S., 800.

The bill was in no sense for the benefit of the leased roads, and the receivership could not be extended further than the interest of the Wabash Company in the property. If the scope of the bill had been broad enough to have authorized a receivership of the whole property, and such a receivership had been attempted to be created, the action would have been entirely beyond the jurisdiction of the Circuit Court of the United States for the Eastern District of Missouri.

The scope of the action is also determined from the final decree entered in the cause, which was simply a decree of foreclosure of the General Mortgage of the Wabash Company.

The scope of the receivership, as originally created, was never extended by any decree or order, and so far as the leased roads were concerned, was never anything more than a receivership of the

leasehold interest of the Wabash Company in those roads.

The suggestion of counsel for the receivers that the latter in retaining possession of the leased road, were influenced by the wish to perform in its behalf the duty of the owners to the public, *i.e.*, of running it, is certainly characteristic.

This, as far as it goes, would put their continued possession upon the ground of pure unmixed benevolence, and they would appear all the more high-toned in their charity by covering it with the outgiving that they were holding the line in the interest of the Wabash system as "a going concern" and with the intention of continuing the payment of the agreed rental.

The performance of the duty referred to would be purely voluntary and gratuitous when all they had to do was to avail of their privilege, as since stated by this Court in *Sunflower Oil Co.* vs. *Wilson*, to elect *whether they would adopt the contract and make it their own*, or *return the property, paying, of course, the stipulated rental for it so long as they used it.*

The inclusion of the Quincy Company by name in the action did not alter the relations of the parties.

It was not made party to the bill until subsequently to the appointment of the receivers, and had no notice of the application for such appointment.

When it was brought in it found the existing condition of things to be that it was cited in under a bill which recognized its rights to demand a forfeiture of the lease in case of non-payment of rent, and which asked the court to provide for the payment of the rent to prevent the right of

forfeiture accruing, and it found that the court had recognized that state of facts by accepting jurisdiction under the bill, and by appointing receivers to take possession of the property and directing them to pay the rental.

The making of subsequent out-givings by the court did not call for any particular action on their part.

They were entitled to stand by and enjoy the condition of affairs which gave them their rent, and they were entitled to rely upon the liability of the receivers to pay the stipulated rental until they surrendered the possession of the road.

They were entitled to do so by virtue of their agreement with the Wabash Company.

The catastrophe which brought about the receivership was that of the Wabash Company, not that of the Quincy Company.

The suggestion of the receivers' counsel practically is, that because the Wabash Company came to grief the Quincy Company should come to grief also.

There is no soundness in such a suggestion. In the lease which regulated the relations of the two companies it was provided the other way, viz. : that the Quincy company should have its rent no matter what happened the Wabash Company.

This fully disposes of the suggestions of counsel for the receiver that "it was the duty of the Court, "to distribute the earnings of the system, not in "recognition or discharge of any contract obliga- "tions of the Wabash Company, but on equitable "principles, giving to each creditor what he was "justly entitled to according to his rank and "class."

No arbitrary, miscalled "Equity" can control or affect the relations of the parties in the matter. The contract relations must control. The contract bondholders and creditors of the Wabash Company hold their position, and the contract lessors hold theirs. If one be involved in hardship or loss greater than that of the other, the Court will not arbitrarily give one relief at the expense of the other.

When the contract mortgagees entered into their relations with the Wabash Company they knew the results which would follow in case of disaster to the Wabash Company, and among other things they knew that in case of a receivership, their interests would be subject to the receivership expenses, and that rents of leased lines would be included in these if the receivers after a reasonable time for election should continue to hold and run the leased property.

The contract lessors when making their contracts based them upon their knowledge that the worst which could befall them would be the continued payment of their contract rent, or, as named in the "*Sunflower*" case, *the return of the property in good order and condition with payment, of course, of the stipulated rental for it so long it was used.*

It is not competent for counsel now to come into Court and urge that the contracts should be disregarded, because by payment of the stipulated rental as receivership expenses, the lessors would be in better position than the bondholders.

The terms of the contracts must prevail.

(3). *The receivers were practically in the same position as if they were assignees of the leases. Their rights and liabilities are the same as those*

of assignees who become liable for rent on an acceptance of the lease.

"When the assignment is by deed, an assignee "becomes liable as such by merely accepting the "deed; but if a man becomes assignee only by "operation of law, he is not, in general, chargeable, "until he actually enters, or does some other act "showing his acceptance of the lease.

Taylor, Landlord and Tenant, § 451.
Salmon vs. *Smith*, (1 Saund., 203).
Williams vs. *Bosanquet*, 1 B. & P., 238).

"As a rule, receivers are not liable upon the "covenants of the persons over whose effects they "are appointed, but become liable solely by reason "of their own acts. And receivers who have been "appointed over a corporation, and who have ac- "cepted the trust and taken possession of the "assets, do not thereby become liable for rent of "the premises held by the company under a "lease.

"Nor can they be held liable until they elect to "take possession of the premises, or until the "doing of some act which would, in law, be equiv- "alent to such an election. But when a receiver "enters upon and occupies premises which have "been leased to a corporation over which he is "appointed, he thereby becomes liable for the rent "due under the lease, the liability, in such case, "being the common law liability of an assignee of "a lease, and not for the debt due by the cor- "poration."

High on Receivers, § 273.

The rule thus stated is supported by an unbroken line of concurrent decisions both in England and America.

In *Thomas* vs. *Pemberton* (7 Taunt., 206), it was held, that if the assignees of a bankrupt intermeddle with, and assume the management of a leased farm, this was a sufficient election to take the lease, and made them liable to the landlord, in consideration of their tenancy, for all mismanagement.

In *Hanson* vs. *Stevenson* (1 B. & Ald., 303), which was an action for rent brought against assignees in bankruptcy as assignees of the term, Lord Ellenborough said :

"Here it is stated as a fact that they have tak en "possession, and by that act, unexplained, they "must be considered to have possessed themselves "in virtue of the legal right conferred upon them "by the assignment for the commissioners, viz. : "as assignees of the term, and then they have "made themselves liable to the covenants of the "lease. I know of no instance in which a deliber- "ate act of taking possession has been curtailed of "its full legal effect."

The modern English rule is the same.

In re Oak Pits Colliery Co.,
(L. R., 21 Ch. Div., 330).

"Secondly, as to rent accruing after the com- "mencement of the winding up.

"If the liquidator has retained possession for "the purposes of the winding up, or if he has "used the property for carrying on the company's "business, or has kept the property in order to "sell it or to do the best he can with it, the land-

"lord will be allowed to distrain for rent which "has become due since the winding up. * * *

"When the liquidator retains the property for "the purpose of advantageously disposing of it, "or when he continues to use it, the rent of it "ought to be regarded as a debt contracted for the "purpose of winding up the company, and ought "to be paid in full like any other debt or expense "properly incurred by the liquidator for the same "purpose, and in such a case it appears to us that "the rent for the whole period during which the "property is so retained or used, ought to be paid "in full without reference to the amount which "could be realized by a distress."

See also

In re Silkstone, etc., Co. (L. R., 17 Ch. Div., 160).

In re Lundy Gran. Co. (L. R., 6 Ch. App., 462).

In re North Yorkshire Iron Co. (L. R., 7 Ch., D., 661).

In re Silkstone & Dodworth C. & I. Co. (L. R., 17 Ch. D., 158).

In re South Kensington Co. Stores (L. R., 17 Ch. D., 161).

The same doctrine has always prevailed in America, both in the State and Federal Courts.

In *Ex parte Faxon* (1 Lowell, 404), it was held, that an assignee in bankruptcy, unless restrained by the terms of the lease itself, may adopt or reject a term as he finds most beneficial for the creditors, and may take a reasonable time to decide the question, but, if he takes the lease, he makes himself liable on behalf of the estate for the rent.

Martin vs. *Black* (9 Paige, Ch. 641).

WALWORTH, C.: "The situation of the receiver in "this case is analogous to that of an executor, who "cannot be charged as the assignee of the lease, if "he waives the term, the income of which is not "sufficient to pay the rent, although the estate of "the testator may be liable for the rent in the due "course of administration, if the landlord refuses "to re-enter (*Went. Off. of Ex.* 245; 2 *Will. Ex.* "1079, *per Macdonald, C. B.;* 3 *Anst.* 909). Such, "also, is the law in relation to the assignee of a "bankrupt. If the assignee elects to waive the "term, and neither enters upon the demised prem-"ises, nor does any other act signifying his accep-"tance of the term as assignee, he is not liable for "the rent, and the lessor must come in as a general "creditor of the bankrupt's estate, or may sue the "bankrupt for the rent subsequently accrued "(*Bourdillon* vs. *Dalton*, 1 *Payne*, N. P. C. 238; "*Wheeler* vs. *Beaman*, 3 *Camp.*, 340; *Copeland* "vs. *Stevens*, 1 *B. & Ald.*, 593).

"But if the assignee enters upon the demised "premises, or does any other act which is equiva-"lent to signify his assent to accept the term as "the assignee of the lease, he will become the ten-"ant of the premises, and render himself liable for "the rent (*Thomas* vs. *Pemberton*, 7 Taunt., 206; "*Clark* vs. *Hume*, 1 R. & M., 207; *Hanson* vs. "*Stevenson*, 1 B. & Ald., 303)."

Commonwealth vs. *Franklin Ins. Co.*
(115 Mass., 278).

ENDICOTT, J.: "The receivers * * * were not "responsible for this rent merely by accepting the "trusts and receiving the assets of the * * * "Company (2 *Allen*, 442). They could have elected

"to take possession and assume the liability to "pay the rent, according to the covenants of the "lease, if they had deemed it for the interest of "the creditors so to do, but until such election, or "the doing of some act which would, in law, be "equivalent to an election, they are not liable. "As receivers, they cannot be held merely on the "covenants, but become liable solely by reason of "their own acts (*Turner* vs. *Richardson*, 7 East., "387)."

People vs. *Universal Life Ins. Co.*
(30 Hun, 142).

"If he (the receiver) were personally liable, still "his occupation was in the discharge of his official "duties, and the court would reimburse to him "anything that he should be compelled personally "to pay.

"If he were liable only as receiver, then he could "not justly enjoy the use and occupation of the "property as receiver without paying the rent. "The rent in that case would not be a claim to be "paid *pro rata* with debts of the company. It "would be, like his necessary expenses, a charge "on the fund. If he had chosen to abandon the "possession at once, he could, probably, have es- "caped liability for the rent accruing. But as he "chose to enjoy the possession, he was bound to "pay the rent which was the consideration there- "for. The liability which the church (the lessor) "seeks to enforce is for the receiver's own tenancy; "it is against him as assignee of the lease, and not "for a debt owing by the company."

Nor is there any relaxation of the rule in favor of

receivers of railways. It is equally applicable to them as to other receivers.

This Court has taken its position upon the subject in no uncertain words.

Sparhawk vs. *Yerkes*,

142 U. S., 1 (p. 13).

Mr. Chief Justice FULLER: "They (the assignees) were not bound, however, to accept "property of an onerous and unprofitable nature which would burden instead of profiting the "estate, *and they could elect whether they would "accept or not, after due consideration and "within a reasonable time*, while if their judgment was unwisely exercised the bankruptcy court "was open to creditors to compel a different conclusion *Glenny* vs. *Langdon*, 98 U. S., 20. "*American File Co.* vs. *Garrett*, 10 U. S., 288.

Sunflower Oil Company vs. *Wilson*,

142 U. S., 313.

Mr. Justice BROWN. "The receiver did not "simply by virtue of his appointment become "liable upon the covenants and agreements of "the railway company. *High on Receivers*, "§ 273. *Hoyt* vs. *Stoddard*, 2 Allen, 242. *Upon "taking possession of the property he was "entitled to a reasonable time to elect whether "he would adopt this contract and make it his own* "or *whether he would insist upon the inability of "the company to pay and return the property in "good order and condition paying, of course, the "stipulated rental for it so long as he used it.* "*Turner* vs. *Richardson*, 7 East, 335. *Commonwealth* vs. *Franklin Insurance Co.*, 115 Mass., "278. *Sparhawk* vs. *Yerkes*, *ante*, 1."

These cases would seem to dispose very effectually of the contention that because the Wabash receivers were merely chancery receivers, they did not become assignees of the lease after election made by them to take and hold possession.

Their liability would appear to be the same *i. e. to pay the stipulated rental for the property so long as they used it.*

"The principles which govern the liability of an "assignee of a lease seem to be applicable to the "case of a receiver (of a railroad), and he would "be equitably and legally chargeable with the "payment of rent under a lease for such time as "he continued to occupy the property demised."

Woodruff vs. *Erie Railway Co.*, (93 N. Y., 591).
Borg vs. *Illinois Midland R. R. Co.* (117 U. S., 434).

(4.) *There was an election to accept the leases on the part of the receivers.*

a. Their appointment was applied for in order that they might, for the benefit, not of the lessors, but of the Wabash Company and its bondholders and stockholders, *accept the leases and preserve the leaseholds from forfeiture.*

"Your orator further showeth unto your Honors "that *several of the leasehold interests possessed* "*by orator are of extreme importance*, as some of "the lines so leased form valuable links in the "chain of your orator's lines. * * *

"That under the terms of said leases, the *lessor*

" *companies will be enabled to declare a forfeiture*
" *of orator's rights unless promptly paid the rent-*
" *als accruing therefor, and that unless some pro-*
" *vision is made by which such rentals can be*
" *promptly met, your orator's leasehold interests,*
" *or some of them, of great value, will be declared*
" *forfeited and wholly lost to orator, and orator's*
" *lines and power of earning money thereby very*
" *seriously affected.* * * * * *

" Orator also prays that such orders be made as
" would enable such receiver or receivers *to raise*
" *money with which to pay all rentals accrued or*
" *accruing, the payment of which are necessary to*
" *prevent the forfeiture of orator's valuable lease-*
" *hold interests, and thus prevent the breaking up*
" *of orator's lines.*

" That your Honors will order and direct that
" said receivers, *after paying* the current expenses
" of operating and maintaining said railroads, and
" also paying for all labor, supplies, *rentals* and
" services aforesaid, and also after protecting the
" endorsers aforesaid, and thus preventing a for-
" feiture of orator's interests, rights, and property
" embraced in said collateral trust, and also after
" paying such claims as required to be paid in or-
" der to prevent a forfeiture of orator's rights, and
" interests in all rolling stock and equipments, *ap-*
" *ply the residue or surplus of all incomes, rev-*
" *enues, and earnings of said railroads, and all*
" *other assets coming into their hands as such re-*
" *ceivers, to the discharge of all debts,* obligations
" and liabilities of orator, according to the rights
" and legal and equitable priorities of all concerned
" as *creditors or otherwise,* under the direction of
" the court."

This was the sole object of the bill filed on behalf

of the Wabash Company. It was not a bill in the nature of an assignment by a bankrupt for the benefit of general creditors; it was a bill filed for the express purpose of preventing active creditors from obtaining any advantage until the mortgage creditors, the bondholders, had the opportunity by reason of default in the payment of their interest to invoke the protection of the court.

The bill was filed to preserve the Wabash system as a "going concern" and prevent the dissolution and dispersion of its several parts. It is altogether immaterial whether the receivership benefitted to the extent expected, or not. The receivers had the option of electing whether they would accept the leases or surrender the property and terminate the leases, paying the stipulated rental for it so long as they used it, and they had a reasonable time within which to exercise the option. They exercised their option and accepted the leases, and they cannot now be permitted to regret their action and be wise at the expense of the lessors with whom they dealt.

b. The receivers had, in the order appointing them, direct authority from the Court to accept the leases, and thereby protect the interests of the Wabash bondholders.

"Ordered, that Solon Humphreys and Thomas "E. Tutt, be and the same are hereby appointed "receivers of the said railroads, and all the prop-"erty of said company, with power and instructions "to take possession of the same, and to manage, "control and operate said railroad, preserve and "protect all said property. * * * *That*

" *said receivers also, in like manner, pay all rentals*
" *accrued or which may hereafter accrue upon all*
" *leased lines of said complainants*, and for the
" use of all terminals and track facilities, and all
" such rentals or instalments as may fall due from
" said complainants for the use of any portion of
" road or roads, or terminal facilities of any
" other company or companies, and also for all
" rentals due or to become due upon rolling stock
" heretofore sold to complainant and partially paid
" for."

Not only, therefore, were the receivers authorized so to do, but they were directed to accept the lease and pay the accruing rental, *for the purpose of protecting the property of the Wabash Company, i. e., the leasehold interest.*

c. The identity of courts and their receivers is matter of elementary law. The receiver is an officer of the court; the property is in the custody of the court.

" A receiver is frequently spoken of as the hand
" of the court, and the expression very aptly des-
" ignates his functions as well as the relations
" which he sustains to the court."

Id. § 2.

" The receiver is the officer of the court and truly
" the hand of the court. His holding is the hold-
" ing of the court."

Ellicott vs. *Warford*, (4 Md. 80).
Beach on Receivers, § § 1. 2.

It is of not the slightest consequence, so far as the liability of the receivers is concerned, whether they acted under the express orders of the court or only under the general rules governing receivers in like cases. In either case they are liable for the stipulated rental during their use of the property.

The suggestion that the action of the receivers in taking possession of the leased property cannot be construed as an election because made in obedience to the orders of the court, is distinctly humorous.

The logical consequences of such suggestion would be that if the receivers in disobedience of the court had taken possession of the property, such action would be voluntary on their part, they would become liable for the rent and the receivership assets would also become subject to the same liability. If, on the other hand, the receivers are faithful officers and obey the court in taking posession, the element of voluntary action will be lacking, and no liability can be enforced against them or the receivership property.

No question is made that as between the receivers and the court which appointed them, the order of the court amply protects them for the acts done in obedience to it.

It is practically suggested by the counsel for the receivers that if the receivers had entered upon the occupation of the leased property without the authority of the court's order and without its instructions, their acts would have constituted an acceptance of the lease and have rendered the receivership estate liable for the full payment of the rent.

In other words the lessor is deprived of a remedy against the receivership estate which it

would otherwise have had, because the receivers received the instructions of the court before acting in respect to the lease.

The test of the liability of the receivers is their continuance, beyond a reasonable time in which to make an election, of the enjoyment for the purposes of the trust of the leased property. In the absence of fraud it is altogether immaterial whether it turns out eventually that the receivership estate had not benefited to an equal or greater amount than the rent paid.

c. The acts of the receivers in reference to the leased roads constituted an acceptance of the lease.

Woodruff vs. *Erie Railway Company*,
93 N. Y., 609.

The Erie and Genesee Valley Railroad Company leased its road, property and franchises to the plaintiff for the unexpired term of its charter, plaintiff covenanting to pay a specified sum as rental by paying and taking up interest coupons, to the amount specified, upon bonds issued by the company. Plaintiff subsequently leased the property to the defendant railway company for the same rental. Thereafter, the defendant, Jewett, who had been appointed receiver of the defendant railway, took possession of the leased road, and operated it in connection with the other lines placed under his control as receiver.

The action was brought to compel the receiver to pay, out of the funds in his hands applicable thereto, the coupons maturing during his occupancy as receiver.

"The order appointing him receiver was originally made on the 25th of May 1875, in an action in the Supreme Court, brought in the name of the People by their Attorney-General, under the statutes regulating the jurisdiction of courts of equity over the estates of insolvent corporations, against the Erie Railway Company, and the several mortgagees of the property of such road, and all others interested therein, for the purpose of dissolving such corporation and distributing its assets among its creditors.

"A supplementary order in such action conferring additional power upon the receiver was made by the same court on the 29th day of May, 1875, By such orders, it appeared among other things that the receiver was authorized to take immediate possession of all the property and exercise the functions of the said Erie Railway Company, and continue the operations of the road in the ordinary and usual course as the same was then operated, and to purchase and pay for all such needful material and supplies as might seem to him to be necessary and proper, and to do whatever might be needful to maintain and preserve the corporate organization and franchises of the company until final judgment in the action, and to defray the necessary and proper expenses incident thereto. He was further authorized in the exercise of a sound discretion to pay any rent then due, or that might thereafter become due under any lease then held by the Erie Railway Company, in manner and form as provided by such leases respectively, and in order to prevent a forfeiture of any leases, he was authorized to borrow money for the payment of

" such rent, and issue the usual receiver's certifi-
" cates therefor. * * * * *

" One of the principal objects contemplated by
" these orders was to enable the receiver to con-
" tinue the operation of the road and its depend-
" encies, and *to prevent any interruption of its*
" *business which would materially impair the*
" *value of the road and the security of its mort-*
" *gagees and creditors.*

" It would seem to be entirely immaterial as to
" the source whence the funds in the hands of the
" receiver were derived, or whether the particular
" portion of such road covered by mortgages con-
" tributed more largely to such fund than other
" portions not subject to such liens. Under the
" orders in question, the receipts from whatever
" source derived, were to form one common fund
" applicable in the first instance to the discharge of
" the obligations which the receiver was thereby
" authorized to incur.

" Whatever might be the respective rights of the
" various parties to this action, as between them-
" selves, to priority in participation of the assets
" of the insolvent Erie Railway Company, such
" right could affect only the property remaining
" after the liabilities created under the receivership
" had been fully paid and satisfied.

" Under the orders referred to, it was not only
" within the power of the receiver to assume the
" obligations of the several leases referred to, so far
" as the payment of rent either due or to grow due
" thereon was concerned, and discharge the same
" with any funds in his hands, but he was further
" authorized to bind even the corpus of the estate
" without regard to the right of the several mort-

"gagees therein in exercising the authority con-
"ferred upon him."

"The receiver was not only thus authorized to
"assume the obligations of the lease and bind the
"estate in his hands to the payment of the rent
"accruing thereon, but by entering into the pos-
"session of, and occupying such leased property
"he manifested, by an unequivocal act, his election
"to regard the continuance of such lease as bene-
"ficial for all of the parties interested, and his in-
"tention to continue the interest acquired by the
"Erie Railway Company under such lease. He
"could not take possession of the property and
"enjoy its use and occupation without incurring a
"liability for the payment of the rent under the
"lease by which his predecessor secured its posses-
"sion. The principles which govern the liability
"of an assignee of a lease seem to be applicable to
"the case of a receiver, and he would be equitably
"and legally chargeable with the payment of rent
"under a lease for such time as he continued to
"occupy the property demised.

"While it was competent for him at any time
"to negotiate anew, and secure a modification of
"the terms of the lease with the consent of the
"various parties interested, or to repudiate the
"lease and surrender the property, yet, not having
"done so, he must be held to have continued his
"acceptance under the terms and conditions of
"the existing lease as to the payment of rent
"thereon.

"His position has been said to be analogous to
"that of an executor who takes possession and
"enjoys the occupation of property held under a
"lease by his testator. He thereby becomes lia-
"ble for the payment of the rent accruing during

" his occupancy of the premises according to the " terms of the lease under which it was acquired. " The assignee of a bankrupt also occupies an an- " alogous position, and is subject to a similar lia- " bility."

d. The receivers are liable for the rent reserved in the lease and it is immaterial what amount the leased property earned during their possession thereof.

" While we regard these considerations as decisive " of the receiver's liability, we have not failed to " notice the argument of the respondent as to the " equities of the parties, founded upon the assumed " inability of the leased road to earn the amount " of the rent secured by the lease.

" If the lease in question was an unprofitable one " for the receiver to continue, it was optional with " him at any time to terminate it by a surrender of " the demised premises, and thus avoid liability " thereunder.

" It seems to us, however, that it does not neces- " sarily follow that the value of any specified por- " tion of an extensive railway system can be meas- " ured with exactness by the amount of the re- " ceipts of such particular portion. Its value as a " feeder or connecting link in such a system may " be largely disproportioned to the actual sum re- " ceived for transportation over it. Such consid- " erations, influential as they might be in affecting " the action of parties in negotiating a contract for " the use of a railroad, would preclude a court " from holding that the actual receipts of a road

" thus situated constituted an equitable basis for
" fixing the compensation to be paid for its use."

Woodruff vs. *Erie Railway Co.*, (*supra.*)

The case of *Miltenberger* vs. *Logansport Railway Company*, 106 U. S., 286, does not conflict with this view. There the lessee was not an appellant and the propriety of directing payment, out of the assets of the receivership, of the rent in full could not have been raised.

For some reason, the parties were content with a smaller sum, and all the court was called to pass upon, was the propriety of allowing a credit for the payment of the smaller sum, and it was clearly proper that it should be allowed. The court was not in any manner called upon to decide whether the rent fixed in the lease should be allowed.

The case of *Fosdick* vs. *Schall* (supra), on the other hand, though not parallel, was decided on principles similar to those of *Woodruff* vs. *Erie Railway Co.*, and in the very late case of *Borg* vs. *The Illinois Midland Railway Co.* (*supra*) the Supreme Court again approved these principles.

The case of *Kneeland* vs. *American Loan and Trust Company* (136 U. S., 89), establishes the general right to recover rental during the period when a receiver is in possession, and is not an authority in favor of the receivers in the present case.

That was a case where a receiver was appointed at the instance of a general creditor who took possession of the railroad and rolling stock of the company, among which was rolling stock leased to the company with the right of purchase, and the

court held that the lessors could not take from the fund in which the mortgagees were interested rent for the period when the property was being worked in the interest of the general creditor.

But, as has already been stated, the bill in the present case was exactly the opposite of a creditor's bill. It did not ask the possession and operation of the property for the aggrandizement of a particular creditor; it asked the court to take possession of and operate its property in the general interest and especially in the interest of the mortgagees to prevent the aggrandizement of diligent creditors or the escape of leased lines upon default in payment of rent.

"That in that event orator's lines of road will be "broken into fragments, that the unity of orator's "system of roads will be entirely destroyed, that "orator will be prevented from realizing a revenue "from the use of its lines and that in all probabilty "orator's roads will be sold in small sections so "that it will be impossible to re-establish the "unity thereof now existing.

"And orator avers that *the interests of orator in "said road and of all its creditors and holders of "the bonds aforesaid* are greatly imperilled by the "existing prospect of the disruption of said road "on the happening of the default impending as "aforesaid, and the interest of all parties can only "be protected by the interposition of a court of "chancery.

"That if said lines of railroad are broken up as "aforesaid and the fragments thereof placed in the "hands of various receivers and the rolling stock, "materials and supplies seized and scattered abroad "in the manner above indicated, the result will "produce irreparable injury and damage, not

" merely to orator, *but to all persons having any* " *interest in said lines of road, and the securities* " *thereof.* * * *

" And your orator further showeth unto your " Honors, that your orator and its board of direct- " ors, conceiving that it was their duty to protect " said property, and to *treat the same as a trust* " *fund for the security first of its creditors*, and " *then of orator's stockholders*, have determined to " appeal to your Honors, sitting in Chancery, to " take possession of the said lines of road through " the instrumentality of one or more receivers, and " thereby to prevent the breaking up of said lines " of road and the scattering abroad of its assets in " the manner above indicated."

The immediate action of the court upon this bill recognized and carried out the object of the bill. The receivers Humphreys and Tutt were appointed under it for the purpose of preserving the property for the benefit, first, of the Wabash creditors—the bondholders, and then of the stockholders.

The bill was the forerunner of the foreclosure bill. It stated and alleged the " intention of the " trustees named in the general mortgage aforesaid " as soon as the impending default aforesaid shall " occur, and as soon as they may lawfully act under " the terms of their trust, to proceed to foreclose " the said general mortgage; and they intend to " take steps in your Honors' court for that pur- " pose."

The bill was to protect the Wabash system as a " going concern," and to hold it together so that it would not be scattered abroad, and all for the benefit of the bondholders and stockholders.

The receivership was exactly the same in its nature and scope before the foreclosure bill and

consolidation as afterward. *The mortgagees received the benefit before the* default, and the benefit was continuous.

The receivership from its inception was in the interest of the Wabash bondholders and stockholders, and the Court, when suggestion was made upon the consolidation that an order should be entered reappointing the receivers in the consolidated action refused to do so because it was not necessary.

The receivers were authorized to issue certificates which never would have been allowed under a creditor's bill. *The payment of these certificates was worked out after the consolidation.*

It must always be borne in mind that *the receivership was only of the leasehold interest*—the only interest the Wabash Company had in the property. The bill was in no sense for the benefit of the lessor companies, but was to preserve the *Wabash property, i. e.*, the leasehold interests. The object of the bill was to preserve the possession and control of the leased roads under the leases, by the appointment of receivers who should accept the leases and pay the rentals. That was the plan set forth in the bill, and the only plan, and the order appointing the receivers expressly contemplated the payment of the rentals by the receivers, and that they should thereby become assignees of the leases.

The idea of keeping the possession and control of the leased roads without payment of the rentals was an afterthought, begotten of a rapacity not contemplated when the foundation of the action was laid and the receivers appointed.

The rights of the lessors were established then, and the subsequent action of the courts could not, and did not, affect such rights. The lessors stood

throughout the possession of the receivers in the same position. The receivership did not change, and their position was unaltered.

Their position from the start was exactly the position in the Kneeland case after the discharge of the receiver appointed under the creditor's bill, and the inauguration of the receivership in the interest of the mortgagees.

e. Nor was the lessor under any duty to apply for the possession of the demised property, and so terminate the liability of the receivers.

Woodruff vs. *Erie Railway Co.*

(*Supra.*)

The leases were valid contracts made by the Wabash Company. Under them the lessors had a choice of remedies in case of the failure of the lessee or its assigns to pay the rent.

They might leave the property in the hands of the lessee and its assigns and permit them to collect the earnings, relying upon their personal liability for the rent, or they might elect to terminate the lease for breach of condition and regain possession of the property demised.

They were under no duty to the lessee to adopt one of these courses rather than the other. They could be put to the election only by the breach by the lessee of the covenant to pay rent and they had an absolute right in that event to take the course they should deem most expedient. They were under no obligation to take one course rather than the other, for there is no rule of law which lays upon the creditor the duty of sacrificing his legal

rights for the pecuniary profit of his contract debtor, and of permitting the debtor to profit by his own default.

The receivers obtained possession of the leased property solely by virtue of the possession of the lessee by succeeding to the rights of the Wabash Company in the leased roads. The receivers therefore necessarily also succeeded to its liabilities which underlay those rights and were its foundation. The possession of the receivers was the possession of the lessee, dependent in its beginning for its validity upon the existence of the lease, and equally dependent for its valid continuance upon the continued validity of the lease.

The court in taking possession of the leased railroads did not pretend to act for the benefit of all concerned, nor was any claim put forth that it did until long subsequently. The primary object was to preserve intact the Wabash system for the benefit of the Wabash Company and its creditors and stockholders, which necessarily involved the performance of the conditions of the lease in order to prevent forfeiture.

There is not a word in the bill upon which the assertion that it was for the benefit of the Quincy Company can be based. And if the bill were in any sense for the benefit of the Quincy Company the only benefit which it could receive was the payment of the stipulated rental for the use of its road. It was no benefit to the Quincy Company to use its road, wear out its rails and pay it nothing.

The action of the court gave the lessors of the leased roads just grounds for expecting the payment of the rents. The court through its officers had taken possession of the leased property, and was operating it and collecting the incomes of the roads *for the*

avowed purpose of preserving intact the Wabash system.

And it was within the power of the court, within a reasonable time, to direct the receivers to surrender possession of the leased property. But not only was no such action taken by the court, but it more than once refused to permit the receivers to surrender leased roads, although the conditions by which they were held had been broken, and not in any case, however prompt the application, did the court authorize such surrender save on condition of a more or less complete submission by the applicants to its jurisdiction.

It was also within the power of the mortgagees, if they were dissatisfied with the possession and operation by the receivers of the leased roads, to apply to the court to compel the receivers to surrender possession to the lessor companies.

Sparhawk vs. *Yerkes* (*supra*).

The burden of making election was upon the receivers and the mortgagees, not upon the lessors. They were absolutely entitled to remain passive.

There is nothing in the order of the Circuit Court of the United States for the Eastern District of Missouri, of June 28. 1884, directing the accounts of the various branches to be kept separately imposing this duty upon the lessors.

By the order appointing them the receivers were directed to pay the rentals of leased lines as they became due.

There was never any express modification of this order, nor was any order made inconsistent therewith until April 10th. 1885.

It is to be noticed, that before June 28th. the receivers, in pursuance of the order of the court ap-

pointing them, had exercised the election to accept the leases. Hitherto, the liability, under similar circumstances, could be terminated only by a surrender of possession. An order that the accounts of the leased line should be kept separate is not equivalent to this.

"While it was competent for him at any time "to negotiate anew and secure a modification of "the terms of the lease with the consent of the "various parties in interest, or to *repudiate* the lease "and *surrender* the property, yet *not having done* "*so* he must be held to have continued his ac- "ceptance under the terms and conditions of the "existing lease as to the payment of rent "thereon."

Woodruff vs. *Erie Railway Co.* (*supra*).

Nothing short of a surrender of the property, with the intention of extinguishing the leases, would have sufficed to terminate the liability of the receivers under the lease, and that is just what they did not do.

f. *The orders made by the Circuit Court for the Eastern District of Missouri, with respect to keeping separate accounts, can neither deprive the lessors of rent, nor reduce it in amount.*

To produce either result, the order must have had one of two effects. It must have created practically a separate receivership of the property, or it must have cast upon the lessors a duty to reclaim their property. To the former, the same objections

apply as to the creation of such a receivership on the filing of the Wabash bill.

If the receivership was of the leasehold, and the receivers became practically assignees of the lease and accepted the lease, there cannot be a release from liability, simply because of a failure to satisfy that liability. The landlord is under no obligation to take possession in order to lessen his lessee's liability for rent. It was at any time within the power of the court to direct the receivers to notify the complainants that the receivers would cease the operation of the leased railroad under the terms of the lease, and would surrender it to them. This would have terminated the liability of the receivers, but it is evident that *no such course of action was ever taken by the court until April 16. 1885, and the fact that it then required the receivers to apply for instructions, and upon actual notice to all those interested in the leased railroads, is sufficient evidence that it did not then consider that any previous action on the part of the court had imposed the duty of taking possession upon the lessors.*

II.—The receivers are liable for rental of the leased roads, independently of whether they became assignees of the leases or not.

a. *Their possession was for the benefit and protection of the Wabash Company, its mortgage creditors and its stockholders.*

The receivers took possession of the leased roads and operated them under the orders of the Court, for the benefit of the Wabash Company and its creditors and stockholders, not of the lessor.

Counsel for the receivers contends that "the "Wabash receivership was established because it "appeared to the court from the allegations in the "bill of complaint *that the financial condition of* "*the Quincy Company*, as well as that of all the "other defendants, *would be improved* by keeping "all the railroads and rolling stock previously in "possession of the Wabash Company together un-"til such time as the several parties interested (all "of whom were made defendants in the bill) could, "if they so desired, be heard in their own behalf "in opposition to such a course."

The bill was not filed for the protection of the Quincy Company, and could not have been. The receivership was not created for the benefit of the Quincy Company, and could not have been. But the bill was filed and the receivership was created for the benefit and protection of the lessee and its mortgage creditors and stockholders, and one of the methods by which such benefit and protection

were to be secured was the retention and use of the property of the Quincy Company under the lease by the payment of the rental.

The bill declares this and the order appointing the receivers directly, and in terms recognized it and authorized it.

The idea now advanced that the bill was filed for the protection of the Quincy Company is humorous. What character of protection could or did the receivership afford the Quincy Company? To work its road without repairs? To wear it out doing the work of the lessees without compensation, without payment, and to suggest a charge upon it of receivership and ante-receivership indebtedness of the Wabash Company? Such was the only protection afforded the Quincy Company under the receivership.

The only interest the receivers appointed under the Wabash bill could conserve and protect was the interest of the Wabash Company, and that interest was a leasehold interest and nothing more; and the only way in which that interest could be protected was by the payment of the rent under the lease, and thus retaining possession of the road *as against the lessor company.*

The suggestion now that the receivership inaugurated under such auspices and for the purposes expressly declared in the Wabash bill was in the interest of the lessors is preposterous.

b. *Such possession rendered them liable for the payment of the rent.*

Sunflower Oil Company vs. *Wilson*

(*supra.*)

Kneeland vs. *American Loan Co.*,

136 U. S., 98,

" But it is urged, and with force, that the court " did not allow contract price but only rental, and " the question is asked, may a court through its " receiver take possession of property and pay no " rental for it. If it may legitimately compel the " operation of the railroad in the hands of its re- " ceiver in order to discharge the obligations of the " company to the public, may it not also and must " it not also burden that receivership and the prop- " erty in charge of the receiver, with all the ex- " penses connected with the operation of the road, " together with reasonable rentals of the property " used and necessary for the operation of the road. " As to the general answer to these questions we " have no doubt. A court which appoints a receiver " acquires by virtue of that appointment certain " rights, and assumes certain obligations *and the* " *expenses which the court creates* in discharge of " these obligations *are burdens necessarily* on the " property taken possession of, and this *irrespective* " *of the question who may be the ultimate owner* " *or who may have the preferred lien, or who may* " *invoke the receivership.* So, if at the instance of any " party rightfully entitled thereto, a court should " appoint a receiver of property, the same being " railroad property, and therefore under an obliga- " tion to the public of continued operation, it, in " the administration of such receivership, might " rightfully contract debts necessary for the opera- " tion of the road, either for labor supplies or ren- " tals, and make such expenses a prior lien on the " property itself."

This is just the situation in the Quincy case. The

court on the application of the Wabash Company, which application was afterwards adopted by the mortgage creditors by the filing of cross bill and consolidation, took the possession of the lessors' railroad, and operated it, not in behalf of the lessor company, for it had no right whatever to do that, but in behalf of the Wabash Company, its mortgage creditors and stockholders, and thereby the receivers became liable to pay rental to the lessor company for such use and occupation.

The rule is also stated in the opinion of Thayer, J., on the application of the Quincy trustees for the payment of their rents, as follows:

"The principle which underlies all of the cases "cited appears to be substantially the same, that is "to say, if an assignee in bankruptcy, public "liquidators, receivers of insolvent corporations or "receivers appointed under proceedings to fore-"close mortgages, take possession of the property "of a third party held under a lease, and use it "ostensibly for the purpose of administering ad-"vantageously on the assets in their hands, or at "the instance of and for the benefit of mortgagees, "full rent must be paid for the use of such prop-"erty out of any funds within the control of the "court, and that without reference to the question "whether the use of the leased premises proves to "be beneficial or otherwise."

Miltenberger vs. *Logansport Railway Co.* (*supra*).

"We see no valid objection to this allowance. "It is on the basis not of the lease, but of the "actual value of the use of property used by the "receivers with the clear assent under the circum-

"stances of all parties interested which use the
"first mortgage bondholders and their trustee
"chargeable with full knowledge never sought to
"prevent, such use being founded on the lease
"which was property in the hands of the mortgagor.
"The line was used for the benefit of the mort-
"gagor's road and of the holders of the bonds under
"the mortgages, with their acquiescence. Whatever
"the court would have done as an original ques-
"tion if called on to determine whether the receiver
"should use and run the Evansville road these ap-
"pellants must now be held in view of all the facts
"to have consented to treat the right to run that
"road and take its income as if that right were a
"part of the mortgaged property and subject to
"the same rules as the other mortgaged property."

The learned District Judge, fell into the error of supposing that the receivership was inaugurated for the benefit of the lessor company as well as of the mortgage creditors and stockholders of the Wabash Company. This, however, was not the case and could not be. The Wabash company could not exercise any such tender consideration for the lessor company and there was no such intention. The receivership had no such object. Its sole object was to conserve and protect the interests of the Wabash company, *i. e.*, the leasehold interest in the leased railroad, against the lessor company, and for the benefit of the Wabash mortgage creditors and stockholders.

The only method by which this could be done and the method expressly recognized and adopted both in the bill and the order appointing the receivers was by payment of the rental reserved in the lease.

The receivers being appointed in the interest of the Wabash mortgage creditors and stockholders, and, as to the leased railroad, taking only the use under the lease, could have surrendered the road to the lessor company immediately and avoided any liability.

If they took the railroad for any deeper object, such as the conservation and protection of the interests of its owners, they assumed such conservation and protection voluntarily and the most prominent element of it was to keep the reserved rent paid to the Quincy company.

c. *Such reasonable rental is the amount reserved in the lease.*

Sunflower Oil Company vs. *Wilson* (*supra*).

"Upon taking possession of the property he "was entitled to a reasonable time to elect whether "he would adopt this contract and make it his "own, or whether he would insist upon the ina- "bility of the company to pay and return the prop- "erty in good order and condition, *paying of* "*course the stipulated rental for it so long as he* "*used it.*"

This is the rule as laid down by this court at this term. But the receivers contention is, that the lessors were under obligation to come after their road, and that the receivers were entitled to use the road and wear it out without compensation.

There is no other basis on which to ascertain the rental, and it is of no consequence whether the leased road earned the amount of such rental or

not. It might have been profitable to the Wabash Company and its mortgage creditors to retain possession of the leased road even if it should remain idle.

It was believed to be necessary that such possession should be retained, when the bill was filed and the receivers appointed, and when it was ascertained, as alleged, that the Quincy Railroad was not paying expenses, the receivers still retained possession.

There was no obligation on the lessor company to demand the possession of its road from the receivers and the fact that they did do so and received possession of the road is entirely inconsequential.

They were entitled so long as the Wabash receivers held possession of their road to stand upon their rights and claim the payment of their rent, and the burden was upon the receivers to surrender the possession, not on the lessor company to demand it.

The Wabash receivers assumed the responsibility for the rent by taking possession of and operating the road and the only way they could rid themselves of such responsibility, was by surrendering possession within the reasonable time referred to in the cases.

It would have been quite competent for the receivership to have been so constituted as not to have required the receivers to take possession of the leased road, but the taking possession was expressly contemplated in the bill and the order appointing the receivers, as a part of the scheme of protection of the Wabash mortgage creditors and stockholders, and upon the basis and expectation of paying the rent.

The rent agreed upon at the time of making the

lease is the only test of the reasonable compensation due for the use of the road, and it does not lie in the mouths of the receivers to suggest any other *quantum meruit.*

They knew the rental when they accepted the possession of the road and held it against the lessor company, and they knew they could only hold such possession by payment of that rental.

That rental was accepted by both the lessor company and the Wabash Company, at the time of making the lease as the reasonable value of the leased road and the receivers having retained possession of the road with knowledge of its amount recognized that amount as being the reasonable value.

The fact that on the books of the receivers the Quincy railroad appears to have earned less than its operating expenses is entirely inconsequential and altogether valueless as an indication of the value of that road to the Wabash system.

What would have been earned by the Quincy road if it had been operated primarily in the interest of the Quincy company cannot be determined with any accuracy, and its value as a "feeder" is not capable of demonstration.

The difficulties were stated by his Honor Judge Brewer, in the course of the Wabash litigation, as follows :

"The freight which passes over a branch may "pass on that branch but a short distance and then, "perhaps, a long distance over the main line. All "that is credited to the branch is the mileage pro-"portion of the freight charges, and yet the busi-"ness which these branches have thus poured into "the main line may well be the very business which "has made those main lines paying lines. It may

"not be possible accurately to determine the "amount of such business. I see tables have been "prepared indicating that several million dollars "of business has passed over those branches on to "the main lines and which but for these branches "might never have touched the main lines. In "that aspect they are operated for the benefit of "the entire property. As my brother Thayer well "stated in our consultation to treat those non-pay- "ing branches as useless encumbrances, which "should be cut off, would be like damming up the "little branches of the Mississippi because they are "not navigable like the mighty river into which "they pour. It is the continuation of their smaller "currents which makes the mighty volume of the "Mississippi and renders it navigable, and so it "was the combination largely of the little currents "of business which made them paying lines, "and no man with the figures before him can now "say how much of the business of the main lines is "and was due to the fact that these branches were "kept in operation."

And the language of Ruger, C. J., in

Woodruff vs. *Erie Railway Co.*
(*supra*)

is to the same effect.

"It seems to us, however, that it does not neces- "sarily follow that the value of any specified por- "tion of an extensive railway system can be "measured with exactness by the amount of the "receipts of such particular portion. Its value as "a feeder or connecting link in such a system may "be largely disproportioned to the actual sum re- "ceived for transportation over it. Such consid- "erations, influential as they might be in affecting

" the action of parties in negotiating a contract for " the use of a railroad would preclude a court from " holding that the actual receipts of a road thus " situated constituted an equitable basis for fixing " the compensation to be paid for its use.

The claim that the only rental to be paid must be on a "*quantum meruit*" as to a branch of a great and distended system of railway, when the extent of the *quantum meruit* is to be determined by the debtor is too fast and loose.

The reasonable value of the road was determined when the lease was executed. It certainly cannot be urged that the Wabash Company paid more than a reasonable value, for it asked the court to hold possession of the leasehold through receivers by paying the rental. No claim has been made that the rent named in the lease is insufficient, and there is no practicable method by which any other solution can be arrived at.

d. *It is altogether immaterial whether the receivers, became assignees of the lease by operation of the law or not.*

Much of the argument of counsel for the recivers is to the effect that because the receivers were merely chancery receivers and not statutory receivers, and because the legal title to the estate did not pass that therefore the receivers did not become assignees of the lease by operation of law, and this is urged as a reason why the receivers should be allowed to occupy and operate the property for the benefit of the Wabash mortgagees, and then refuse to pay for such use and occupation.

But the argument is without merit in this case-

No distinction whatever is drawn in any of the cases between the liability of a statutory receiver and that of a "mere chancery receiver," to pay for the use and occupation of the property of a third person for the benefit of the mortgagees. A chancery receivership is just as liable for such use and occupation as a statutory receivership.

The distinction is attempted to be drawn but there is no real difference, especially as the bill was filed and the receivership ordered for the protection of the lessees and the receivership so far as the lessors were concerned, only affected the leasehold, and as between the lessors and lessees the receivership was for the protection of the latter against the former.

What counsel overlooks entirely is that the claim for rent rests not upon the question of whether the title to the property passes to the receiver or not, but upon the power of a court of equity to charge the property with the receivership expenses, and that the question of title does not affect the power of the court in this respect.

There is no practical distinction arising from the fact that the receiver in the case of Woodruff *vs.* Erie Railway Company (*supra*), for example, may have become vested with the legal title to the estate by virtue of a statutory provision, and that the receivership in the Wabash case was based upon general chancery principles, and as a matter of fact no such distinction is suggested in the Woodruff case.

The receiver in the Woodruff case was appointed under the general equity powers of the Supreme Court, and the fact that by statute he became vested with the property upon his appointment, is altogether immaterial. The court made no point of

such fact, but decided the case upon principles of equity, and the same principles apply in the present case.

The suggestion of this distinction is virtually an admission of the application of the Woodruff case to the one at bar.

III.—The rent due from the receivers for the time during which they controlled and operated the leased roads is a receivership expense, and as such a charge upon the property of the receivership.

a. *If the receivers are liable for the rent at at all, the claim against them therefor is a preferred claim, to be paid out of the property of the receivership.*

Borg vs. *Illinois Midland R. R. Co.* (*supra*).

"It is settled that the receiver may be ordered to "pay out of the income, and as one of the expenses "of operating the road, the rentals due for a line "leased by the company, whose property he has in "his possession and which he is authorized to oper- "ate; and if a receiver uses such a leased line with "the full knowledge and consent of the bondhold- "ers, the payment of a fair rental for the use of such "line, and also payment for supplies and materials "used in its operation, may be enforced out of the

" proceeds of foreclosure before distribution among " the bondholders."

Beach on Receivers, § 272.

" Where the property of which a receiver is ap- " pointed consists of a leasehold interest, the receiver " should make it his first duty to see that the rent " thereof is paid ; he should not wait for the land- " lord to take any proceeding to collect, but he may " pay it absolutely and without first obtaining leave " of the court. In the event of his failure to do so, " he may be required to do it by a petition in the " cause in which he was appointed, and also, upon a " like petition, he may be required to make good any " loss to the lessor arising from the failure of the " tenant to keep covenants or agreements or main- " tain premises in as good condition as he received " them."

Id., § 514.
Fosdick vs. *Schall*, (*supra*).
Millenberg vs. *Logansport Ry. Co.*, (*supra*).

b. *If it is a preferred claim, it is a charge upon the property of the receivership, and prior to any rights therein of either the Wabash Company or the trustee of its general mortgage.*

As such, by the terms of the decree of sale, entered by the Circuit Court of the United States for the Eastern District of Missouri, the purchaser must pay it, before a clear title to the property purchased can be obtained.

If it is a charge in reality, it is quite immaterial whether it is called a charge or a lien.

It does not lie with the Wabash receivers to devise means to evade satisfaction of it; nor with the Wabash Company to dispute the right and power of the Court to make the charge, for it has no longer any interest in the property; nor with the Central Trust Company, to deny the authority of this Court to execute the lien, for the Wabash decree was entered upon its motion; nor with the purchasers to contest the validity of the charge, for they purchased expressly subject to it.

The word *charge* may appear to be a word of lighter meaning and yet, practically, may have the same affect as if the word *lien* had been used. Technically, the word *charge* is the one to be used in the connection referred to.

By the terms of the final decree entered at St. Louis, the property which had been in the possession of the receivers was to be and afterwards was, sold subject, specifically, to be charged with all debts and liabilities of the receivers decreed or to be decreed. And this decree stands as *res adjudicata.*

The purchasing committee cannot now complain if the rent be made a lien upon the property purchased by them.

Their rights are dated no further back, and are no deeper rooted than the decree.

The decree defines them and gives them.

Under the decree, they buy their property specifically charged with "all claims or allow-"ances that have been or may be charged against "said property, or any part thereof, *or said re-"ceivers.*"

It was part of their contract, upon their purchase, that all claims which should be decreed against the receivers, should be charges upon the purchased property, and it does not lie with them

now to endeavor to repudiate the terms of their bargain.

If the receivership were created, not for the benefit of the lessor companies, but of the lessee and its creditors and stockholders, then the lessor companies were not interested in the fund in the court, its management and preservation were not for their benefit; their property has been used by the court through its officers, the receivers, for the benefit of others, and the court must comply with the conditions on which it has retained possession of the property.

There is no foundation for the argument that the rental is simply an unsecured claim and must fare no better than the other unsecured claims.

The rental is an expense of the receivership and must be paid, and in preference to any payments to the security holders.

Sunflower Oil Co. vs. *Wilson* (*supra*).
Kneeland vs. *American Loan Co.* (*supra.*)

Nor is there any more foundation for the claim that the rent of the leased line should not be paid preferentially to the Wabash mortgage interest.

There is no question of sympathy or equity in this matter. It is matter of contract and of the relations of the parties under the written instruments establishing such relations.

There is no assimilation of a mortgage debt and a liability of a lessee or the successor or representative of a lessee to pay the owner of property rent or compensation for its use when it is held in use.

The payment of such rent or compensation by a receiver is a part of the receivership expenses and

takes preference of payments back to investors. The receivers must pay the stipulated rent for the property so long as they used it.

IV.—The decree appealed from should be reversed, and the claim for rental allowed.

JAMES THOMPSON,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 223.

THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY, and THEODORE GILMAN and CHARLES H. BULL, Trustees,

Appellants,

vs.

SOLON HUMPHREYS and THOMAS E. TUTT, Receivers of the WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

ADDITIONAL BRIEF IN BEHALF OF THE APPELLANTS.

EDWARD W. SHELDON,
Of Counsel for Appellants in Nos. 516 and 620, and for Appellee in No. 626.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY and THEODORE GILMAN and CHARLES H. BULL, Trustees,

Appellants,

AGAINST

SOLON HUMPHREYS and THOMAS E. TUTT, Receivers of the Wabash, St. Louis and Pacific Railway Company.

No. 223.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

ADDITIONAL BRIEF IN BEHALF OF THE APPELLANTS.

Statement.

This is an appeal from a decree entered March 19, 1888, dismissing the intervening petitions of the appellants above named in the foreclosure action brought by the Central Trust Company of New York and James

Cheney against the Wabash, St. Louis and Pacific Railway Company, said intervenors and others. These petitions were filed to recover rental and certain other operating expenses of the Quincy, Missouri and Pacific Railroad, which accrued during the period in which that railroad was operated by the receivers, appellees.

On the 21st day of August, 1879, the Quincy, Missouri and Pacific Railroad Company, a Missouri corporation, leased its line of railroad to the Wabash Railway Company, for the term of ninety-nine years, at a rental measured by a graduated percentage of the road's gross earnings, with a guaranteed minimum payment equal to the six per cent. interest on the first mortgage bonds of the lessor company, to be issued at the rate of $9,000 a mile for each mile of completed road (Record, fols. 16-26). As constructed shortly afterward, that railroad extended from the Mississippi River at West Quincy, in Missouri, westerly 134 miles to Trenton, in that State, and $1,204,000 of bonds were accordingly issued and sold. The lessee further agreed to equip, maintain and operate the railroad so leased, for the full term, and to pay all taxes and assessments levied thereon (fol. 21). The mortgage securing these bonds was dated October 1st, 1879, and conveyed all the railroad of the lessor company, as then constructed, or thereafter to be constructed (fol.9), to Solon Humphreys and Orville H. Browning, in trust for the holders of the bonds. The mortgage further provided (fol. 10) that proceedings to enforce its covenants might be taken six months after default. Subsequently the appellants Theodore Gilman and Charles H. Bull were substituted as such trustees.

In November, 1879, the Wabash Railway Company, a consolidated corporation of Ohio, Indiana and Illinois, by further consolidation with the St. Louis, Kansas City and Northern Railway Company, a Missouri corporation, became the Wabash, St. Louis and

Pacific Railway Company (fol. 66). By the terms of this consolidation, the new corporation assumed all the obligations of both of the constituent companies (fol. 47). Thereafter it issued $17,000,000 of what were known as its "general mortgage" bonds, secured by a mortgage to the Central Trust Company of New York and James Cheney, as trustees (fol. 211). This mortgage covered all of its railways, leaseholds and other property (fols. 197–200). By a later mortgage, dated May 1st, 1883, to the Mercantile Trust Company of New York, 14,246 shares of the stock of the Quincy, Missouri and Pacific Railroad Company were pledged, with a large nominal amount of other property, to secure $10,000,000 of what were called "collateral trust" bonds of the Wabash Company (fols. 209–213).

From 1879 until 1884 the terms of this lease were complied with. In May of the latter year, however, the Wabash Company presented to the Circuit Court of the United States for the Eastern District of Missouri, a bill of complaint, setting forth, among other things, the Railway Company's insolvency, its inability to meet various pressing debts, including the interest due June 1, 1884, on its general mortgage and certain other of its bonds, the consequent danger of a breaking up of its system of railways, and the irreparable damage that would result from such a disruption, and praying for the appointment of receivers of all its property (fols. 67–87). On the same day this application was made, May 27, an order was entered appointing the appellees Solon Humphreys and Thomas E. Tutt receivers of all the property of the Wabash Company, and, among other things, directing them to pay all rental accrued or which might thereafter accrue upon all the leased lines (fols. 89–91).

A few days later the trustees under the general mortgage filed their cross-bill for foreclosure. A separate

foreclosure action, thereafter instituted by these trustees in a State Court, was removed to the Federal Court, where both cross-bill and independent bill were consolidated with the original bill of the Wabash Company.

In the latter part of June, 1884, the receivers made an *ex parte* application to the Court for advice; first and second, as to the payment of interest on certain enumerated bonds, not including those of the Quincy, Missouri and Pacific Railroad Company; third, as to the payment of the rental of the Eel River Railroad; fourth, as to the payment of interest on the Detroit, Butler and St. Louis Railroad, and fifth, as to how they should keep the accounts of the earnings and expenses of certain enumerated lines, including the Quincy, Missouri and Pacific Railroad (fol. 94). Upon a reference to a master, the order recommended by him, two days later, was adopted by the Court. By this the receivers were ordered, until otherwise directed, to keep the accounts of the earnings and expenses of certain lines of railway, including the Quincy, Missouri and Pacific Railroad, separately, and to make quarterly reports thereof. The reports covering the period from May 27th, 1884, to May 31st, 1885, thereafter filed, showed in the case of this railway, an aggregate excess of expenses over earnings of $20,550.81 (fol. 143).

The semi-annual instalment of interest falling due July 1, 1884, on the Quincy, Missouri and Pacific bonds, was not paid. Similar default was made in the instalments of January 1st, 1885, and July 1st, 1885 (fol. 27). The taxes imposed upon the property for the year 1884, amounting to $16,000, were also left unpaid, and necessary repairs neglected, t make which $15,000, besides the $16,000 required for taxes, were expended by the trustees under the mortgage, when they took possession (fol. 32) as hereinafter set forth.

In March, 1885, the Wabash receivers applied to the Court for instructions with respect to the further operation of the various lines held under leases, and

concerning the payment of the rentals agreed to be paid therefor. Notice was given to the solicitor of the present appellants that this petition would be heard April 14, 1885 (fol. 147). The Court, on April 16th, announced its opinion on the application, which was directed to stand as an order, to the effect, among other things, that where any subdivision earned a surplus over expenses, the rental or subdivisional interest would be paid to the extent of the surplus; where it earned no surplus, but simply paid operating expenses, that no rent nor subdivisional interest would be paid; and where not only was no surplus earned, but an actual deficiency existed, that operating expenses would be reduced to a minimum (fols. 148–149).

In conjunction with this application, the trustees under the Wabash general mortgage asked to have the receivership extended, so as to become a receivership under that mortgage. This request was denied, on the ground that the receivers were not receivers for either party, but were simply the hand of the Court (fol. 150).

On the 1st of August, 1885, the appellants Gilman and Bull applied for the surrender of the property mortgaged to them. Their petition was granted, and the railroad turned over, reserving all rights of the Quincy Company and of the trustees for rental of the property during the Wabash receivership, or otherwise (fol. 188).

December 1st, 1885, these trustees filed in the consolidated cause a petition of intervention, for the recovery of rental from January 1st, 1884, to August 1st, 1885, amounting to $114,380 (fol. 2). A similar petition was filed June 12, 1886, by the Quincy, Missouri and Pacific Railroad Company for the recovery of the same rental, for the repayment of $16,000, disbursed by trustees Gilman and Bull for taxes levied in 1884, and $15,000 for repairs necessary to the safe operation to the leased prop-

erty, that should have been made by the receivers, and praying that said sums constitute liens superior to all the mortgages upon the property of the Wabash Company (fols. 29-33). The net earnings of that company for the same period, January 1st, 1884, to August 1st, 1885, were $1,012,857.39 (fol. 184).

On the 6th of January, 1886, a decree of foreclosure and sale under the "general" and "collateral trust" mortgages, was entered (fol. 189). This decree, founded not on the original Wabash bill, but on the bills and cross bills of the trustees of these mortgages (fol. 195), specially reserved all rights under the Quincy, Missouri and Pacific and other leases and mortgages (fol. 216), and adjudged that the receivers' surrender of any leased branch lawfully terminated the lease as of the date of such surrender (fol. 242). At the sale had April 26th, 1886, in pursuance of this decree, a committee of "general" and "collateral trust" bondholders, consisting of James F. Joy, O. D. Ashley, Thomas H. Hubbard and Edgar T. Welles, became the purchasers for $625,000 (fol. 258). By subsequent orders of June 15th, 1886, September 21st, 1886, December 31st, 1886, and March 30th, 1887, the sale was confirmed and the receivers were directed, upon certain conditions being met and certain security given, to transfer all the property in their possession to the purchasing committee (fol. 264). This surrender took effect April 1st, 1887. The Court, however, retained jurisdiction of the property in the hands of the committee, or its assigns, for the purpose of satisfying all claims against the property or the receivers established under the foreclosure decree of January 6th, 1886, or pursuant to any other order of the Court (fol. 269).

The special master, to whom these two petitions of intervention were referred, reported adversely. The exceptions filed by the intervenors were overruled, and an order entered March 19, 1888, dismissing the peti-

tions, with costs (fol. 45). The opinions of the Circuit and District Court Judges, in support of this decision, are printed at folios 46 to 65.

Both the Wabash purchasing committee and the trustees under the "general" mortgage are, with the receivers, parties respondent on this appeal (fol. 1).

Summary of the Argument.

I. When receivers elect to take possession of leased property, they obligate themselves to perform the covenants contained in the lease.

II. The application of this general rule to the facts of the present case, establishes the liability of the Wabash receivers for the rental of the Quincy, Missouri and Pacific Railroad from January 1st, 1884, to August 1st, 1885.

III. No circumstances peculiar to the present case, prevent such application.

IV. The errors believed by the appellants to exist,

A. In the reasoning of the Circuit Court.

B. In the contentions of the appellees' counsel.

V. The income collected by the receivers is primarily charged with the payment of these claims, with recourse, if necessary, to the corpus of the property.

VI. The same considerations govern the claims for taxes and repairs that should have been borne by the receivers.

VII. HENCE THE DECREE OF THE CIRCUIT COURT SHOULD BE REVERSED, AND JUDGMENT DIRECTED FOR THE APPELLANTS, AS PRAYED IN THEIR PETITIONS OF INTERVENTION.

Point I.

WHERE RECEIVERS ELECT TO TAKE POSSESSION OF PROPERTY, REAL OR PERSONAL, HELD UNDER A CONTRACT OF LEASE, THEY BECOME LIABLE FOR THE RENT DURING THE PERIOD OF THEIR POSSESSION, AS EQUITABLE ASSIGNEES OF THE LEASE.

This doctrine is so well settled as to be axiomatic. It proceeds, as was said in the Matter of Otis, 101 N. Y., 580, 585, "on the ground that on the election "being made, the receiver or assignee becomes vested "with the title to the leasehold interest, and a privity "of estate is thereby created between the lessor and "the receiver or assignee, by virtue of which the "latter becomes liable on the covenants running with "the land."

The learned counsel for the appellants, in his exhaustive brief, has cited at length the leading authorities which sustain the rule, and we will only enumerate several of the best known here:

Turner vs. Richardson, 7 East., 335.
Thomas vs. Pemberton, 7 Taunt., 206.
In re Silkstone & Dodworth Coal & Iron Co., L. R. 17 Ch. Div., 158.
In re North Yorkshire Iron Co., L. R., 7 Ch. Div., 661.
Ex parte Faxon, 1 Lowell, 404.
Woodruff vs. Erie Railway Co., 93 N. Y., 609.
People vs. Universal Life Ins. Co., 30 Hun, 142.

Martin vs. Black, 9 Paige, 641.
Commonwealth vs. Franklin Ins. Co., 115 Mass., 278.
High on Receivers, 2d Ed., §§ 273, 394*b*, 395*b*.
Beach on Receivers, §§ 372, 514.

With the citation, therefore, of a few additional and recent decisions, we may dismiss this point from further consideration.

"The lease in question is one of that class of en-
"gagements designated in the statute as open and sub-
"sisting. The receiver is authorized by the statute
"and judgment to contract for its extinguishment, but
"until this is done the lessors are entitled to payment
"of the rent as it accrues. They cannot be deprived
"of the benefit of the covenant to pay rent, without
"some act on their part releasing or discharging it.

"The position of the receiver is analogous to that
"of an executor. If he waives the term he cannot be
"charged as assignee of the lease, but if the landlord
"does not choose to re enter, the estate of the testator
"may be liable for the rent in the due course of admin-
"istration. And under the Bankrupt Law of England,
"the rule was the same in regard to an assignee in
"bankruptcy. If he did not enter under the lease, he
"was not liable for the rent, but the lessor could come
"in as a general creditor of the bankrupt estate, for the
"rent."

People vs. National Trust Co., 82 N. Y., 283, 288.

In re International Marine Hydropathic Company, L. R., 28 Chancery Division, p. 471, presented the following facts:

A hotel company was dissolved by order of Court, and the liquidator (an officer having the functions of a receiver) directed to sell the hotel. Until the sale he was authorized to carry on the

business with a view to its sale as a "going concern." The liquidator accordingly maintained the business in the hotel, but made no profit by it. Shortly after the commencement of the winding-up, a poor rate was levied, and the overseers of the parish claimed payment of the rate from the liquidator in possession. This claim was sustained in full.

A similar conclusion was reached in the case of

In re National Arms and Ammunition Company, L. R., 28 Chancery Division, p. 474.

There a manufacturing company was in process of voluntary dissolution. The liquidator, while not carrying on full work, remained in occupation of the business premises for the purpose of performing some pending contracts, completing a quantity of unfinished articles, and storing a quantity of finished articles with a view to selling them. During his possession a local rate was imposed on property within the district. The liquidator was held liable to pay the rate in full.

See also *In re* Dry Docks Corporation of London, L. R., 38 Ch. Div., 306.

The method of escaping this liability is illustrated in the later case of

In re Blackburn & District Benefit Building Society, *ex parte* Graham, L. R., 42 Ch. Div., 343.

This society being a mortgagee in possession of land subject to a rent charge created by deed, took the statutory procedings to secure a voluntary dissolution. The official liquidators, appointed by the Court, for some time paid the rent charge. Then, finding that the annual income from the property was not equal to the rent charge, they obtained leave from the Court to surrender the land, and gave notice to the tenant in occupation and to the owner of the rent charge, that they claimed no further interest in either land or rent. The owner of the rent charge, Graham, intervened to

prove in the winding-up his claim for arrears which had accrued after the repudiation.

On these facts it was held by the Court of Appeal that the company and its liquidators were only liable so long as they were in possession of the land; that the liquidators had sufficiently repudiated their interest in the land, and that no subsequent claim could be maintained for the rent charge.

Still more significant was the language of this Court in a recent decision:

"They (assignees in bankruptcy) were not bound, "however, to accept property of an onerous and un- "profitable nature, which would burden instead of "benefiting the estate, and they could elect whether "they would accept or not, after due consideration "and within a reasonable time, while, if their judg- "ment was unwisely exercised, the bankruptcy court "was open to the creditors to compel a different con- "clusion. (Glenny vs. Langdon, 98 U. S., 20; American "File Co. vs. Garrett, 110 U. S., 288."

Sparhawk vs. Yerkes, 142 U. S., 113.

The specific application of the principle to a railway receivership was made in the same volume of reports, Mr. Justice BROWN saying:

"The receiver did not simply, by virtue of his ap- "pointment, become liable upon the covenants and "agreements of the railway company. (High on Re- "ceivers, Sec. 273; Hoyt vs. Stoddard, 2 Allen, 442.) "Upon taking possession of the property, he was en- "titled to a reasonable time to elect whether he would "adopt this contract and make it his own, or whether "he would insist upon the inability of the company to "pay, and return the property in good order and con- "dition, *paying, of course, the stipulated rental for it "so long as he used it.* (Turner vs. Richardson, 7 East, "335; Commonwealth vs. Franklin Insurance Co., 115 "Mass., 278; Sparhawk vs. Yerkes, *ante*, 1)."

Sunflower Oil Company vs. Wilson, 142 U. S., 313, 322.

This also accords with the earlier and most instructive case of the Peoria and Pekin Union Railway Co. against the Chicago, Pekin and Southwestern Railway Co., 127 U. S., 200. There the liability of a receiver for the rental of a railway was directly considered by this Court, and the conclusion reached that the parties—the receiver and the lessor—had agreed upon a temporary compensation to abide the determination of the question whether a higher stipulated rent should be paid. A settlement of this question not having been reached, the receiver abandoned the use of the road, paying the temporary compensation up to the time of such surrender. This latter being deemed reasonable and the stipulated rental fictitious and excessive, the receiver was adjudged to have fulfilled his obligation in the matter.

Similar reasoning was employed by the Circuit Court for the Northern District of Illinois, in Thomas vs. Peoria and Rock Island Railway Co., 36 Fed. Rep., 808, HARLAN, J., writing the opinion, and by the Circuit Court for the Eastern District of Texas, in Easton vs. Houston and Texas Central Ry. Co., 38 Fed. Rep., 784, where PARDEE, J., said (at page 788):

"Here is authority—almost express authority—for "the receivers to take possession of the lease between "the intervenor and the railway company, and to run, "operate and manage the cars furnished by the inter- "venor under the said lease. Under this authority, the "receivers, with full knowledge of the obligations of "the railway company, and the condition of the prop- "erty furnished thereunder, did take possession of the "lease and leased property, and operate the same, en- "joying all the advantages thereof, and all for the bene- "fit of the trust fund. It would seem that, under this "state of facts, the receivers, fully authorized thereto, "became the assignees of the railway company, and

" thereby legally and equitably obligated themselves " to perform the several covenants undertaken by the " company as to the care and return of the leased " property. The lease in question was an entirety; " of necessity an assignment or assumption thereof was " of the whole, and not of any particular part."

Finally, under this head, we will cite the decision of the Circuit Judge of the Seventh Circuit in a precisely similar case,

Brown vs. Toledo, Peoria and Western Railroad Co., 35 Fed. Rep., 444.

In every material respect that was a duplicate of the present controversy. The Toledo, Peoria and Western Railroad was a branch of the Wabash system, and was embraced in the receivership. As appears from the record in this case (fols. 106–107), it was alleged to have never earned its operating expenses, and the same directions were given by the Court regarding its operation (fol. 120). No rent having been paid by the receivers for its use, subsequently, on the application of the trustees of its mortgage, it was surrendered to the bondholders. The receivers were adjudged to pay full rental for the period of their possession. The language of Judge GRESHAM is so pertinent to the present inquiry that we will quote it *in extenso:*

" 1. The Wabash Company had a leasehold interest, " and no more, in the property of the Toledo, Peoria " and Western Railroad, and by the terms of the lease " that interest was liable to be forfeited for the non- " payment of rent. The Wabash Company agreed to " pay as part of the rent the interest, as it became " due, upon the first mortgage bonds of the Toledo, " Peoria and Western. The mortgage which the " Wabash Company executed, and which was foreclosed, " bound the leasehold interest in the Toledo, Peoria " and Western property, and nothing more. The rela-

" tions between the Wabash and the Toledo, Peoria " and Western at the time Humphreys and Tutt were " appointed receivers were those of lessor and lessee ; " and the receivers, under the orders of the Court, " were invested with the entire estate of the Wabash " Company, including its leasehold interest in the " Toledo, Peoria and Western property. The re- " ceivers thus became assignees of the lease, and, as " such, liable for the rent.

" 2. The Wabash suit was commenced to preserve " intact the Wabash system for the benefit of that " company and its creditors and stockholders. In " order to do this, it was necessary to prevent the for- " feiture of leases, including that of the Toledo, Peoria " and Western ; and the action of the Court, including " the appointment of the receivers, plainly indicated " that the rent would be paid upon leased lines. At " the time the latter suit was commenced, neither " rent under the lease of the Toledo, Peoria and " Western, nor interest on its first mortgage bonds, " was in arrear ; and therefore neither the Toledo, " Peoria and Western, nor the trustees in its first mort- " gage, had any right to demand possession of the " leased property. It was at all times in the power of " the court which appointed the receivers to direct " them to surrender possession of the leased property.

" 3. The receivership embraced only the property of " the Wabash Company, and the Court took possession " of the property of the Toledo, Peoria and Western, " not for the benefit of that company and its creditors, " but for the benefit of the Wabash Company and its " creditors and stockholders. No part of the expenses " of the receivership can therefore be properly charge- " able against the Toledo, Peoria and Western property.

" 4. The Toledo, Peoria and Western property was " operated by the receivers from May 28, 1884, to June " 18, 1885, and the rent which accrued during that " period, applicable to the payment of interest on the

" first mortgage bonds, amounted to $321,080.47, which
" amount is due from the receivers to the trustees in
" the first Toledo, Peoria and Western mortgage, less
" $99,571.17, already paid by the receivers on that
" account.

" 5. The right of this court to decree upon the claim
" of the trustees in the first mortgage of the Toledo,
" Peoria and Western for rent for the use of the leased
" property during the time it was in the possession of
" Humphreys and Tutt as receivers, is provided for,
" and recognized in the orders and decrees of the court
" in the Wabash suit at St. Louis.

" A decree will therefore be entered against the re-
" ceivers for the rent which accrued during their pos-
" session of the leased property, less $99,571.17, the
" amount already paid as stated, which amount so de-
" creed to be due shall be made a charge upon the
" property of the receivership, as part of the receiver-
" ship expenses."

Point II.

APPLYING THIS RULE, THE WABASH RECEIVERS MUST BE HELD LIABLE FOR THE RENT OF THE QUINCY, MISSOURI AND PACIFIC RAILROAD FROM JANUARY 1ST, 1884, TO AUGUST 1ST, 1885.

The terms of the lease were explicit, and the respective obligations of the parties distinctly defined. The lessor complied with its covenants, as did the lessee, until the receivers were appointed, in May, 1884. Included in the covenants by the lessee, it will be remembered, was one requiring the lessor to pay the stipulated rent in the shape of interest on the lessor's

bonds, notwithstanding the insufficiency of earnings for that purpose (fol. 22). According to the receivers' allegations, this insufficiency always existed (fol. 35), and at no time after the road was built did it earn its operating expenses and fixed charges (fol. 108). Yet, knowing this, the Wabash Company, at a time when no default under the lease existed, asked that this leasehold interest be placed in the hands of receivers, and the receivers accepted and retained it. The motives which guided their conduct in this respect will be apparent on referring to the allegations of the bill of complaint which the insolvent company filed against its creditors:

"That your orator owns a number of lines of rail-
" roads extending across the States of Missouri, Illinois,
" and Indiana, and also into the States of Ohio, Michi-
" gan, and Iowa, with branches extending in various
" directions within said States" (fol. 67).

* * * * * *.

"Further complaining, your orator further shows
" unto your Honors that your orator is also the lessee of
" certain other lines of railroads located within the
" said several States, and your orator has operated all
" of said lines as a unit until recently, when said lines
" were leased by the orator to the St. Louis, Iron
" Mountain and Southern Railway Company, a corpor-
" ation existing under and by virtue of the laws of the
" State of Missouri, and that said last-named company
" now operates all of said lines of railroad as the lessee
" of orator.

"That by the terms of said lease said St. Louis,
" Iron Mountain and Southern Railway Company was
" required to pay as rental of said lines all the net earn-
" ings thereof to orator or on account of orator, but
" was not bound to pay or advance to or on account of
" orator any sum or sums in excess of such net earn-
" ings, all of which will more fully appear by reference

" to such contract of lease, made on exhibit, as herein-
" after set forth " (fol. 68).

* * * * * *

" And orator also embraces in said Exhibit A a
" statement of interest obligations assumed by orator
" and secured by mortgages or deeds of trust on its
" leased lines, the payment of such interest being con-
" ditions on which orator obtained such lines " (fol 69).

* * * * * *

" That under the terms of said leases the lessor com-
" panies will be enabled to declare a forfeiture of ora-
" tor's rights, unless promptly paid the rentals accruing
" therefor, and that unless some provision is made by
" which such rentals as may shortly mature can be
" promptly met your orator's leasehold interests, or
" some of them, of great value, will be declared for-
" feited and wholy lost to orator and orator's lines and
" power of earning money will be thereby very seriously
" affected " (fol. 77).

* * * * * *

" And, further complaining, your orator also shows and
" alleges, upon information and belief that, unless pro-
" tected by a court of equity, as soon as the antici-
" pated default aforesaid in the payment of interest
" shall occur a number of suits will be commenced in
" the State or Federal courts held near the line of
" orator's railroad for the appointment of receivers
" under the original sectional mortgages executed by
" the several corporations on portions of orator's lines
" before orator acquired the same.

" That in that event orator's lines of road will be
" broken into fragements; that the unity of orator's
" system of roads will be entirely destroyed; that
" orator will be prevented from realizing a revenue
" from the use of its lines, and that in all probability
" orator's roads will be sold in small sections, so that
" it will be impossible to re-establish the unity thereof
" now existing.

"And orator avers that the interests of orator in "said road, and of all its creditors and holders of the "bonds aforesaid, are greatly imperilled by the existing "prospect of the disruption of said road on the hap-"pening of the default impending as aforesaid, and the "interests of all parties can only be protected by the "interposition of a court of chancery.

"That if said lines of railroad are broken up as "aforesaid, and the fragements thereof placed in the "hands of various receivers, and the rolling stock, ma-"terials, and supplies seized and scattered abroad in "the manner above indicated, the result will produce "irreparable injury and damage, not merely to orator, "but to all persons having any interest in said lines of "road and the securities thereof" (fols. 78–79).

* * * * * *

"And your orator further showeth unto your honors "that your orator and its board of directors, conceiv-"ing that it was their duty to protect said property "and to treat the same as a trust fund for the security, "first, of its creditors, and then of orator's stockholders, "have determined to appeal to your honors, sitting in "chancery, to take possession of the said lines of road, "through the instrumentality of one or more receivers, "and thereby to prevent the breaking up of said lines "of road and the scattering abroad of its assets in the "manner above indicated" (fol. 80).

* * * * * *

"And orator on information and belief states that "said trustees intend to proceed in this cause by means "of a cross-bill to accomplish the said result above "mentioned, but before said trustees could, under the "terms of their said trust file an original bill or a cross-"bill herein and on their motion obtain the appoint-"ment of a receiver or receivers, the evil results appre-"hended by orator and described as aforesaid will cer-"tainly occur and the property aforesaid, real and per-

" sonal, will be broken up, the unity of orator's system " destroyed, and its equipment scattered abroad.

" Inasmuch as orator has not an adequate remedy at " law in the premises, it prays your honors to take " cognizance of this bill of complaint that, in order to " the preservation of the interests of large numbers of " persons, stockholders and creditors, unknown to " orator, and in order to the protection of the inter- " ests of all concerned and to prevent a great multi- " plicity of suits, your honors will appoint one or " more receivers and empower and direct such re- " ceiver or receivers to take possession of said entire " property, and to preserve, operate, and manage and " control the same, collect all indebtedness due or to " become due to orator, and otherwise to discharge all " the duties ordinarily imposed by courts of equity on " the receivers of railroad property by such courts ap- " pointed " (fol. 80).

* * * * * *

" That your honors will order and direct that said " receivers, after paying the current expenses of operat- " ing and maintaining said railroads, and also paying " for all labor, supplies, rentals and services aforesaid, " and also after protecting the endorsers aforesaid and " thus preventing the forfeiture of orator's interests, " rights and property embraced in said collateral trust, " and also after paying such claims as require to be " paid in order to prevent a forfeiture of orator's rights " and interests in all rolling stock and equipments, ap- " ply the residue or surplus of all incomes, revenues, " and earnings of said railroads, and all other assets " coming into their hands as such receivers, to the " discharge of all debts, obligations, and liabilities of " orator, according to the rights and legal and equitable " priorities of all concerned as creditors or otherwise " under the direction of the court " (fol. 82).

* * * * * *

" And orator prays your honors to make such order

" in the premises as will insure the protection of the " interests of orator and its creditors, giving an oppor- " tunity to all the defendants not served with notice to " be heard hereafter, and orator avers that no injury " can arise to any creditor or person in interest from " the appointment of the said receivers with or with- " out notice, as such receivers' possession will inure " to the benefit of all the persons concerned " (fol. 87).

Underlying the scheme of this bill, as well as of other pleadings, and the orders, petitions and opinions filed in the cause, is the constant suggestion of the pressing need and paramount value of maintaining the congeries of roads as a system. That may be said to have been the basis, if not the justifying cause, of this extraordinary receivership. It was not from any philanthropic motive that these leasehold estates were included in the sequestrated property ; nor was it until a much later period of the receivership that the theory of an obligation to the public to maintain every railroad which the receivers had undertaken to operate, found expression. Railways owned by the Wabash Company in fee might, indeed, devolve on its receivers with something akin to that general duty, but estates held by the Wabash Company on the condition of rent payments, need only have been regarded in the light of ordinary investments. If deemed unprofitable ventures, they could have been omitted from the list of property subjected to the receivership, or at any time thereafter surrendered by the receivers to the respective lessors. Only one conclusion is possible from this positive recognition of the leases, namely, that the continued operation of the leased lines was regarded as beneficial to the system, and in the order of appointment this conclusion was acted upon as follows :

" It is ordered, adjudged, and decreed that Solon " Humphreys and Thomas E. Tutt be, and the same

" are hereby, appointed receivers of the said railroads " and all the property of said company, with power " and instructions to take possession of the same and " to manage, control, and operate said railroad, preserve " and protect all said property and collect, as far as " possible, all accounts, choses in action, and credits " due to said company, acting in all things under the " order of this court or of such other courts as may " entertain jurisdiction of parts of said property as " ancillary to the jurisdiction of this court.

* * * * * *

" That said receivers also in like manner *pay all* " *rental accrued or which may hereafter accrue upon all* " *leased lines of said complainant* and for the use of all " terminals or track facilities and all such rentals or in- " stallments as may fall due from said complainant for " the use of any portion of road or roads or terminal " facilities of any other company or companies, and " also for all rentals due or to become due upon " rolling stock heretofore sold to complainant and par- " tially paid for.

* * * * * *

" It is further ordered, that all parties herein, upon " being informed of this order and of the approval of " said bond by this court, proceed *to surrender all the* " *lines of said railroad* and all the property, choses in " action, and accounts of said company to said receivers, " and the complainant is authorized to apply to any " other United States circuit court of competent juris- " diction for such order or orders in aid of the primary " jurisdiction vested in this court in said cause as may " have ancillary jurisdiction herein.

" It is further ordered, that said receivers pay all " current expenses in the operation of said road, collect " all the revenues thereof, and all choses in action, " accounts, and credits due and to become due to the " company."

With this express authorization, the receivers under-

took the management of this leasehold estate, and continued to operate the railroad for fourteen months. They had the fullest information regarding the value of the property, and were in the most intimate relations with the representatives of the "general" and "collateral trust" mortgages. No one else knew, as they did, whether this lease was a *damnosa haereditas*, nor could any one understand, as they did, the benefit—actual and sentimental—resulting from the preservation of the integrity of the system; and it cannot be presumed that for that long period they were guilty of the breach of trust involved in operating railroads that were an absolute loss.

"I know of no instance," said Lord ELLENBOROUGH, "in which a deliberate act of taking possession has "been curtailed of its full legal effect."

Hanson vs. Stevenson, 1 Barn. & Ald., 304, 307.

In amplification of this idea as applied to railway receiverships, the same learned judge from whose conclusions the present appeal is taken, has recently given cogent expression in this Court to certain principles which we desire to especially emphasize.

"But it is urged," he says, "and with force, that the "court did not allow contract price, but only rental, "and the question is asked, may a court, through its "receiver, take possession of property and pay no "rental for it? If it may legitimately compel the "operation of the railroad in the hands of its receiver, "in order to discharge the obligations of the company "to the public, may it not also, and must it not also, "burden that receivership, and the property in charge "of the receiver with all the expenses connected with "the operation of the road, together with reasonable "rentals for the property used and necessary for "the operation of the road? As to the gen-"eral answer to these inquiries, we have no doubt.

" A court which appoints a receiver acquires, by vir-
" tue of that appointment, certain rights and assumes
" certain obligations, and the expenses which the court
" creates in discharge of those obligations are burdens
" necessarily on the property taken possession of, and
" this, irrespective of the question who may be the ulti-
" mate owner, or who may have the preferred lien, or
" who may invoke the receivership. So if, at the in-
" stance of any party rightfully entitled thereto, a
" court should appoint a receiver of property, the same
" being railroad property, and therefore under an obli-
" gation to the public of continued operation, it, in the
" administration of such receivership, might rightfully
" contract debts necessary for the operation of the
" road, either for labor, supplies or rentals, and make
" such expenses a prior lien on the property itself; and
" it is in reliance on this general proposition that the
" interveners insist on an affirmance decree."

Kneeland vs. American Loan and Trust Company, 136 U. S., 98.

* * * * * *

" Now, when the holder of a first lien upon the realty
" alone asks the court of chancery to take possession,
" not only of the real but also of personal property
" used for the benefit of the real, that application is a
" consent on its part that the rental value of the per-
" sonalty thus taken possession of and operated for the
" benefit of the realty shall be paid in preference to its
" own claim. The proposition is a simple one. The
" application may not be a consent that the contract
" price of the personalty shall be paid in preference to
" his lien; but it certainly is a consent that the rental
" value of that personalty, during the time of the pos-
" session by the receiver appointed at his instance,
" may have priority to his claim. If the holder of a
" lien upon the realty does not think that the continued
" possession of the personalty is a benefit to his lien,
" he should simply omit the personalty from his bill,

" and ask the court to take possession of the realty " But either because he believed that the pos- " session of the personalty was necessary for the oper- " ation of the railroad, and the security of his claim ; " or else, because, by virtue of his secondary right, he " expected to pay for the personalty and retain both " the personalty and the realty, he has had the court " take possession of both by its receiver, and by that " act, although subsequently the personalty was re- " turned to the holder of the lien upon it, " he consented to the payment of reasonable " rental pending the receiver's possession. The con- " clusion is irresistible, that under the circumstances " reasonable rental value was properly allowed as a " prior claim to the mortgage indebtedness (*Ibid.*, pp. " 100, 101).

* * * * * *

" The initiative in the matter was taken by the " trustees. They asked, by their bill, that the court " take possession of all the personalty. If more was " taken possession of than was needed, it was their " mistake. The court is not to be assumed to be " an experienced railroad manager, knowing ex- " actly the amount of rolling stock needed for " the operation of the road. It may justly " assume that what had been contracted for was " necessary, and if the trustees ask that all may be " taken possession of, it may act upon that as a declara- " tion that all is necessary, and that rental value is to " be paid for all. Theirs is the inquiry, and not the " court's. It is a mistake to suppose that their duties " in respect to the foreclosure proceedings are formal " merely, or limited to the employment of counsel and " the handling of securities. They assume all the ob- " ligations of a party to the suit. They are charged " with the care of the entire mortgage interest. They " ask and receive large allowances for caring for that " interest ; and it is a part of their duty to make ex-

" amination and become fully informed in respect to
" the property, its liens, what is needed for its
" operation, and what can prudently and
" safely be dispensed with. Upon such information
" their application should be based. It is true
" the court is not concluded by their representations;
" but its information is in the first instance derived
" therefrom, and it may and does generally act upon
" them; and its action, based on them, must be held
" to be conclusive so far as concerns the interest they
" represent, in respect to all liabilities and obligations
" flowing from the possession of a receiver. Whatever
" action the court may take thereafter, on information
" furnished by its receiver, or by them, or otherwise,
" in respect to the property not primarily chargeable
" with their lien, its first action is the recognition of
" the validity of their application; and the taking pos-
" session of all the property they name is in reliance
" upon their representation that all is needed for the
" operation of the railroad, and that they consent either
" to the payment of the unpaid purchase price of any
" property thus taken possession of, or a reasonable
" rental for the use of the same" (*Ibid.*, pp. 101-102).

The pertinency of this language to the present discussion is immediately apparent. The ample knowledge and deliberate action which characterized the treatment of the Quincy, Missouri and Pacific leasehold by the Wabash Company, the receivers and the trustees under the "general" and "collateral trust" mortgages, leave no room for doubt as to their intentions. Those two trustees represented the only interests that could be prejudiced by the retention of this leasehold, or by the payment of the stipulated value of its use. No suggestion of the unreasonableness of the rental was offered, nor, until March, 1885, was the question of the advisability of terminating the lease propounded, and then, it is significant to note, by the receivers, and not by the trustees of

the Wabash mortgages. After holding the matter under advisement, the Court answered the inquiry negatively, and refused to cancel the lease. This decision was acquiesced in by those trustees. No modification of the terms of the lease was proposed, no reduction in the agreed rental asked, and no surrender of the premises effected until the following August. On the first day of that month the lease was "lawfully terminated," as the foreclosure decree of January 6th, 1886, adjudged (fol. 242), leaving a balance of rent due since January 1st, 1884 (fol. 237), and reserving all rights for its collection (fol. 216).

Now, we submit that, so far as involved this lease, only three conditions were possible: First, an acceptance by the receivers of the lease; second, a disavowal of the lease and an abandonment of the premises; or, third, a new contract with the lessors for the use of the premises. Neither of the last two courses having been followed, we are restricted to the first, and compelled to adopt the already quoted language of PARDEE, J.: "The lease in question was an entirety; of neces-
" sity an assignment or assumption thereof was of the
" whole and not of any particular part" (38 Fed. Rep., 784.

Point III.

NO CIRCUMSTANCES EXIST IN THE PRESENT CASE WHICH PREVENT OR MODIFY THE APPLICATION OF THIS LIABILITY OF THE RECEIVERS.

It has been strenuously insisted in the Court below that while the facts involved in this appeal would ordinarily sustain our contention, there are certain additional features which suffice to remove the case from

the operation of the rule laid down in the first point of this brief.

These alleged differentiating facts may be epitomized as follows :

I. That the Wabash receivership was obtained on the application of the insolvent corporation, and not at the instance of a creditor.

II. That the earnings of the Quincy, Missouri and Pacific Railroad did not exceed its operating expenses.

III. That the orders of the Court below, entered *pendente lite*, changed the obligations of the parties.

So much reliance is placed on these features of the case, that we may be pardoned for discussing them somewhat at length.

I. The nature of the inception of the receivership.

It is true that the appointment of the receivers had the anomalous feature of being made on the insolvent's own application. But it is equally true that the receivership embraced all the property of the insolvent, and was created and maintained in a litigation to which all lessors and mortgagees interested in that property were parties. There were the parties, the *res* and the invocation of the aid of a court of equity, and the appointment which followed, by whomsoever proposed, must be deemed to have completely fulfilled the theory of a temporary judicial management of property subject to conflicting claims. It would surely be a parody on justice, if an insolvent, by seasonably anticipating the dishonor of his own promises, could enlist the unconscious but active assistance of a court of equity to hinder and deceive those dealing with him on the faith of the security offered by the court's interposition. What a commentary such a complication would be on

the standard definition of a receiver as a ministerial officer of a Court of Chancery entrusted with the preservation of property *in custodia legis!* We might almost as well pretend that the personality of a suitor would affect the success of his cause.

The possibility of a distinction in status or remedy apparently suggested itself several months after the receivers took possession, for in April, 1885, the trustees under the general mortgage, actuated, doubtless, by a sense of abundant caution, formally asked the Court to reappoint the receivers. This application was summarily denied, the Circuit Judge using this language (fols. 149–150):

"Application also is made for the reappointment of "receivers, or, as stated in the language of the motion, "for extending the receivership to the trust company, "the mortgage in the general mortgage. I confess that "I do not wholly understand why such an order as that "is asked, and I cannot appreciate what counsel mean "when they say make the receivers receivers for the "trust company, the mortgagee.

"As we look upon it, the receivers are not receivers "for either party. They are simply the hand of the "Court. In the process of the litigation the Court has "taken possession of the property, and holds it neither "for the mortgagor nor the mortgagee, and it matters "not for the ultimate determination of the suit at whose "instance the receivers were appointed. They act "for neither party. They represent neither party. "They stand here simply as the hand of the Court, "holding the property for disposition at the end of the "litigation for the benefit of all.

"So I cannot see what can be gained as a legal "proposition by a new order of appointment extending "the receivership, as counsel say, to the trust company, "the mortgagee. The receivers will have no greater "power, no different power, would owe no different "duty, and would be no more and no less subject to

" the orders of this Court than they are now, and cer-
" tainly they would have no right, in the operation of
" their trust, to extend favors to the one side or the
" other.

" Furthermore, as receivers appointed at the instance
" of the mortgagor in the first instance, they took pos-
" session of the entire properties, while this order, as
" tendered, contemplates a seizure of a part only of
" these properties, not all. Having taken possession of
" the road under the idea, in the first instance, that the
" integrity of the system had a value and should be
" preserved, it seems to us the receivership should
" continue right along in that line. There will be no
" reappointment of the receivers."

In spite of this pronounced and convincing state-
ment, the claim has been reasserted, and, what is
still more surprising, with the apparent approval
of the same learned Judge whose words have just been
quoted. Thus, in his opinion denying the appellants'
petitions, while conceding the soundness of the first
point in this brief, he seeks to distinguish the present
case by reason of the peculiar nature of the receivership
(fol. 53). " It is true, also," he says later in the opinion
(fol. 55), " that the holder of the general mortgage
" prayed the Court to extend the receivership over a
" part of the property to it as a mortgagee. *Perhaps*
" *if that application had been granted some different*
" *question might now arise;* but the Court expressly de-
" cided against the application, leaving the receiver-
" ship to stand as it was in the first instance." But, it
is submitted, the application was denied, because it
was distinctly held by the Court to be not only unne-
cessary, but as if almost constituting a reflection on the
Court whose officers the receivers were. To repeat
the emphatic words of the Circuit Judge: " The re-
" ceivers are not receivers for either party. They are
" simply the hand of the Court * * * and it *matters*
" *not for the ultimate determination of the suit at whose*

" *instance they were appointed.* * * * So I cannot " see what can be gained by a new order. * * * " *The receivers will have no greater power, no different* " *power, would owe no different duty* " (fol. 150).

II. The failure of the Quincy, Missouri and Pacific Railroad to produce net earnings.

According to the reports filed by the receivers, the operating expenses of this branch for the first year of the receivership, exceeded its earnings by about $20,000 (fol. 82), and the failure to earn its rental was alleged by the receivers in their answer to the petition of intervention, to have been continuous from 1880 to 1884 (fol. 28). Assuming that the method of computing the earnings of this line (fols. 137–8) was just, we are led to ask what inducement there was to the maintenance of this road for five years at a constant nominal loss? The answer is obvious; the property furnished valuable connections, opened an important country and probably contributed a larger amount to the net earnings of the Wabash system than it was awarded as gross earnings itself. This is the inevitable result of a small feeder and link in a comprehensive railway system. The rent was paid from 1880 to 1884, because it was more than earned, and the receivers accordingly felt justified in undertaking the operation of the road. The Court, under whose direction they were managing the property, has thus expressed it: " In apportioning the earnings of this single " corporation among these various divisions the gen- " eral rule is to apportion them upon a mileage basis. " The freight which passes over that branch may pass " on that branch but a short distance, and then, per- " haps, a long distance over the main line. All that is " credited to the branch is the mileage proportion of " the freight charges, and yet the business which these " branches have poured into the main line may well be

" the very business which has made those main lines " paying lines."

BREWER, C. J., Central Trust Co. vs. Wabash, St Louis and Pacific Ry. Co.; *In re* BONNER, Intervenor, 30 Fed. Rep., 332, 334.

By the application upon which this last-cited decision was rendered, certain bondholders secured by mortgages on portions of the Wabash system east of the Mississippi, sought, by summary order, to procure payment of their arrears of interest out of the general funds of the receivership. The opinion of the Court, upon the denial of the motion, continued:

" It may not be possible accurately to determine the " amount of such business. I see tables have been " prepared indicating that several million dollars of " business has passed over those branches on to the " main lines, and which but for those branches might " never have touched the main lines. In that aspect " they are operated for the benefit of the entire prop- " erty. As my brother THAYER well stated " in our consultation, to treat those non-paying " branches as useless incumbrances, which should " be cut off, would be like damming up the " little branches of the Mississsippi because they " are not navigable as the mighty river into " which they pour. It is the combination of their " smaller currents which makes the mighty volume of " the Mississippi, and renders its navigable; and so it " was the combination largely of the little currents of " business which flowed from those branches in upon " the main lines which made them paying lines, *and no* " *man with the figures before him can now say how much* " *of the business of the main lines is and was due to the* " *fact that these branches were kept in operation.* So " that, both in law and in equity, the obligations of this " single consolidated corporation were enforceable " against each and every part of its properties; that is,

" certainly upon each and every part of the properties " *owned* by it. *There may be some difference as to the* " *leased lines, and some other questions may arise there.*" (30 Fed. Rep., 334-5).

It is not, however, on the theory of a *quantum valebat*, weighty as the equitable considerations which uphold that doctrine, are, that this claim for rental is most strenuously urged, but on the acceptance and ratification by the receivers of the contract under which their sole right to the possession of the property was based.

III. The directions regarding the conduct of the receivership, embodied in orders entered *pendente lite.*

(1) The order of May 29th, 1884, appointing the receivers.

This has been already referred to, and in brief directed that the entire system of railways be taken possession of and operated, and that all rentals accrued or to accrue for the use of leased lines, be paid (fol. 90).

(2) The order of June 28th, 1884.

This was made on the petition of the receivers for advice as to how, among other points, they should keep account of the earnings and expenses of certain enumerated lines (fol. 94), " acquired by purchase, lease " and consolidation in said States, subject, however, to " certain mortgages and deeds of trust *previously* ex- " ecuted to secure bonds," &c. (fol. 104). Included in these lines was the Quincy, Missouri and Pacific Railroad, and with regard to them all the following allegation was incorporated in the petition (fol. 108):

" Your petitioners further state that they are in- " formed and believe that the earnings of none of the " lines or divisions last above described have at any " time since their acquisition been sufficient to pay " their operating expenses, the cost of their mainte-

" nance, and interest on the several series of bonds and " other obligations above described and secured upon " each of them, respectively, by mortgage or deeds of " trust.

" Your petitioners further state that from the incom- " ing rents and profits of the property now in their " possession, under a former order of this honorable " court, they believe they can, until otherwise directed, " pay all the expenses of operating the same, the cost of " maintenance, and all interest from time to time matur- " ing on all bonds or other obligations secured by " mortgage or deeds of trust on the several lines or " divisions thereof that were owned or possessed either " by the 'Wabash Railway Company' or by the 'St. " 'Louis, Kansas City and Northern Railway Company' " before their consolidation, as aforesaid, under the " name of the 'Wabash, St. Louis and Pacific Railway " 'Company.'"

This last paragraph obviously conflicts with the one preceding it, since the Quincy, Missouri and Pacific Railroad was acquired by the Wabash Railway under the lease of August 20th, 1879, before the latter company's consolidation with the St. Louis, Kansas City and Northern Railway Company.

The same contradiction prevails through the remainder of this petition (fols. 108–111), and the concluding prayer for advice was:

" 5th. As to how they shall dispose of the earnings " and keep the accounts of the earnings and of the " operating expenses and cost of maintenance of the " several other lines or divisions aforesaid, and which " have not, and which your petitioners are informed " and believe will not, for the present be enough to " pay their operating expenses, the cost of mainte- " nance and interest on the several series of bonds " secured by mortgage upon them respectively" (fol. 111).

This petition was referred to a special master, who

filed his report June 28th, 1884. He, also, found (fol. 114) that " all the lines of railroad that were owned or " controlled either by the Wabash Railway Company " or by the St. Louis, Kansas City and Northern " Railway Company, and which are hereinafter men- " tioned," had earned more than enough to pay operating expenses, taxes and interest on certain specified securities. The mortgage bonds of the Quincy, Missouri and Pacific Company were not, however, included in that list. The only direction recommended as to that road was :

" 3d. And it is further ordered, that the receivers " herein, until otherwise directed, keep the accounts of " all the earnings and incomes from, as well as the " accounts of all the operating expenses, cost of main- " tenance and taxes upon, the following lines or divis- " ions of said property separately, to wit :

* * * * * *

" 3. The Quincy, Missouri and Pacific Railroad, " commencing at West Quincy and extending to Tren- " ton, in the State of Missouri (fol. 120).

* * * * * *

" And that said receivers make quarterly reports " thereof, showing not only the income and expenses of " each of the lines aforesaid, but also the methods by " which the incomes and expenses of said lines were " respectively ascertained " (fol. 121).

The Court confirmed this report (fol. 121).

It will be seen that in this application for advice, the subject of rent was not considered. It was a question merely whether the earnings ascribed to the various separate lines were sufficient to meet the interest chargeable to those lines. The lease itself in the Quincy, Missouri and Pacific case provided for this very contingency (fol. 22) :

" The party of the second part further covenants " that it will *guarantee* and pay the interest on said " bonds at the rate of nine thousand dollars per mile

" as aforesaid for each mile of completed road, and will " evidence said guaranty by proper stipulation en- " dorsed on said bonds, charging the amount so paid " by it in each year to the percentage " (thirty, twenty- " five or twenty per cent., fol. 21) " of gross earnings " arising in that year and applicable as aforesaid to the " payment of the rent upon the property above de- " mised. Provided that if in any year the said per- " centage shall be less than the amount required to pay " said interest for that year, then the party of the second " part shall defray, *at its own cost*, the deficiency for " that year, which deficiency shall not be chargeable to " any overplus arising from the earnings of any other " year; and in the event that by failure on the part of " said second party to pay said interest the principal " of said bonds shall become due as aforesaid, the same " shall, *at the option* of the party of the first part, *work* " *a forfeiture of this lease*, and thereupon the said " party of the first part, by its officers, agents or com- " mittee, shall be entitled to re-enter and take posses- " sion of all and singular the premises above described " without process of law."

(3) The instruction given October 15, 1884, regarding the Havana Division bonds (fols. 130–135).

The counsel for the receivers laid much emphasis in the argument below on the fact that the Court had announced its disposition against paying interest on the bonds of any division that did not produce independent net earnings sufficient in amount to meet such interest. The essential difference between that case and the present is that there payment was asked from the receivers of interest on defaulted bonds, chiefly of the *Wabash, St. Louis and Pacific Railway Company*, and which the receivers were under no obligation to make. Payment of interest upon such bonds was at best mere speculation, and the Court declined to enter into it. But in ratifying leases existing at the creation of the

receivership the Court must be presumed to have recognized an established rule of law.

Moreover, the advice sought on both of these applications, having been given *ex parte*, was binding only on the receivers.

Missouri Pacific Ry. Co. vs. Texas and Pac. Ry. Co., 31 Fed. Red., 862.

(4) The announcement of April 15, 1885.

In March, 1885, the responsibility attached to the continued operation of the leased railroads seems for the first time to have presented itself to the receivers. Whatever the moving cause, on the 20th of that month they filed a petition in the consolidated action, stating "that *since they took possession* of the system of railroads previously operated by the Wabash, St. Louis and Pacific Railway Company, the earnings of many of the branch and leased lines thereof have not been sufficient to pay the operating expenses, interest on their mortgage bonds, and *the rentals contracted to be paid* by the Wabash, St. Louis and Pacific Railway Company in the several contracts and leases *under which said lines were acquired*" (fol. 144).

The terms of the leases of the various branches were thereupon set forth at some length, with a statement of their earnings and operating expenses for the six months ending November 30th, 1884, showing a deficit for that period in the Quincy, Missouri and Pacific case, "not including any charge for rental," of $10,201.93 (fol. 146). The petition concluded as follows:

"Your receivers therefore pray your honors to make such orders with respect to the future operation of said lines, and concerning the payment of the respective rentals agreed to be paid by said Wabash, St. Louis and Pacific Railway Company in the several leases and agreements aforesaid as to your honors shall seem meet" (fol. 147).

When the application came on to be heard the

Court rendered a full opinion, entitled "*In the Matter* "*of the Application of the Receivers for the Cancellation* "*of Certain Leases,*" which was directed to stand as the order of the Court with respect to the matters therein referred to (fol. 151). In the course of that opinion the Circuit Judge said:

"This Wabash road is composed of many subdi- "visions. While it is a single corporation to-day, yet "into it have passed many corporations and many "separate railroad properties. In administering such "a consolidated property, the Court must look at, not "merely the interest of the mortgagee in this general "mortgage or of the mortgagor as a single entity or "corporation, but also the separate and sometimes con- "flicting interests of the various subdivisions and "their respective incumbrances, and, back of all that, "the duty which every railroad corporation owes to "the public; for underlying the rule which the Supreme "Court has laid down in respect to the payment by "receivers when they take possession of railroad prop- "erty of prior unsecured debts recently accrued runs "the thought, as expressed by the Supreme Court, that "a railroad corporation owes a duty to the public, "which has given it its franchise and enabled it to con- "struct its road—the duty of operating that road for "the benefit of the public. While that may not be "what you may call an absolute duty, enforcable under "all circumstances, it is still a duty to be regarded and "enforced by the Courts when they take possession of "railroads through their officers; and that duty is not "limited to the operation of merely that particular frag- "ment of a road which is pecuniarly profitable in its "operations, but it extends to the road as an entirety "and to all its branches, all its parts differing in that "particular from the duty which would rest upon the "Court if it had simply taken possession of property "used for private purposes, manufacturing or "otherwise, where the single question might "well be said to be one of pecuniary profit. This

" Wabash road, as a system, was in operation, a going " concern, from one end to the other, as such dis- " charging its duties as best it could to its various " creditors. This Court, at the instance of the corpor- " ation and to preserve the integrity of the system, " took possession of it by its receivers. It took pos- " session of it as a going concern, and so far as is rea- " sonable and practicable it should continue it as a " going concern until it surrenders it to whoever may " be the purchasers or future holders of it" (fols. 148*c*, 148*d*).

Having thus determined that no leases should be cancelled, he then proceeded to pass upon the receivers' petition as follows:

1. Subdivisional accounts must be kept separately (fol. 148*d*).

2. " Where any subdivision" (*i. e.*, a branch railroad acquired by lease or consolidation) " earns a surplus " over expenses, the rental or subdivisional interest " will be paid to the extent of the surplus, and only to " the extent of the surplus" (fol. 148*e*).

3. "Where a subdivision earns no surplus, simply pays " operating expenses, no rent or subdivisional interest " will be paid. If the lessor or the subdivisional mort- " gagee desires possession or foreclosure he may pro- " ceed at once to assert his rights. While the Court " will continue to operate such subdivision until some " application be made, yet the right of a lessor or " mortgagee whose rent or interest is unpaid, to in- " sist on possession or foreclosure, will be promptly " recognized.

" That, it is true, *may work* a disruption of the " system, * * * but the proceeding for disruption " will come from the subdivisions. *The Court is not* " *sloughing off branches*, tearing the system in two, but " the disruption, if it comes, will come from those who

"*seek separation* and have legal right to do so" (fols. 148*e*–148*f*).

4. "Where a subdivision not only earns no surplus, "but fails to pay operating expenses, as in the St. "Joseph and St. Louis branch, *the operation of the sub-* "*division will be continued*, but the extent of that oper- "ation will be reduced with an unsparing though a "discriminating hand" (fol. 148*g*).

It is with marked insistence that the appellees recur to this language of the Circuit Judge, as disposing of the claim of the present appellants. We submit that it should not have that effect, not only because of the considerations previously discussed in this brief, but also for these additional reasons:

> *(a)* The opinion was not intended as an adjudication upon ultimate rights. It was simply an interlocutory order settling certain aspects of current administrative policy. The conclusion which it expressed was that the accruing income was to be *currently* applied only to specified purposes. All other questions were reserved for determination in the orderly course of procedure. Yet even when in obedience to the requirement of the Court for an early termination of the receivership (fols 133–135), a final decree was rendered, it was found impossible to incorporate in it a ruling on more than a small fraction of the issues which the ingenuity of the defaulting company had attempted to raise Scores of suits and hundreds of suitors occupied various forums, and as the docket of this Court alone testifies, the end of the legal complications arising from that remarkable bit of railroad financiering, has not yet been reached. Hence, to protect the parties and at the same time to lay the way to an early escape from the burden of

the receivership, the following express reservation was inserted :

" It is further ordered and adjudged, that this " decree or any sale made thereunder shall not " *in any way prejudice or affect* the rights of " parties to or persons interested in certain " mortgages, deeds of trust, leases and contracts " hereinafter set forth, but all the rights of such " persons and parties are hereby reserved to " to them. The deeds of trust, mortgages, " leases and contracts in regard to which such " reservation is made are as follows (fol. 216) :

* * * * * *

" A deed of trust, dated October 1st, 1879, " executed by the Quincy, Missouri and Pacific " Railroad Company to Solon Humphreys and " Orville H. Browning, to secure bonds amount- " ing to $1,204,000 with interest at the rate of " six per cent. per annum. Said deed of trust " became a lien on the line of railroad extending " from a point in Missouri opposite the City of " Quincy, Illinois, to Trenton, Missouri, a " distance of about 134 miles (fol. 236).

* * * * * *

" A lease of the Quincy, Missouri and Pacific " Railway by Wabash Company, August 21, 1879. " Said railroad intended to extend from West " Quincy, Missouri, to some point on the " Missouri River, but never constructed west of " Trenton, Missouri, *said rent being paid to* " *January 1st, 1884* " (fol. 237).

(b) Nor was the opinion operative as a cancellation or surrender of the leases.

The receivers had applied for advice as to whether they should continue to operate certain non-selfsupporting lines, and the order was entitled, " In the Matter of the Application of " the Receivers for the Cancellation of Certain

"Leases" (fol. 148). The answer of the Court in effect was: "No; the integrity of the system must be maintained. Continue the operation of all the lines until any lessor or mortgagee whose contract has ripened into a possessory right, comes to demand his property."

(c) The Court itself relied greatly upon its inherent power to maintain the system as a "going concern," even though to do so would necessitate that last resort—the issue of receivers' certificates.

"Suppose we take possession of a single short "line (and we have in one or two other cases), "the continuance of that as a going concern is "emphasized more than once by the Supreme "Court as a duty, as a reason for paying prior "indebtedness and also as a reason for issuing "receivers' certificates. Stop operating it and "it becomes a dead concern; its connections "are broken up and its value is impaired. "Therefore, to preserve that value the Courts "have said that it has a right in a limited "degree to issue receivers' certificates, and if "that be true where the Court has but a single "line it is equally true where it has a road with "various branches and as to all of those "branches. The value of any branch abandoned "is diminished, and the Court may not consider "simply the interests of the consolidated com-"pany, the mortgagor, and the trust company, "the mortgagee. It is bound to regard the "interests of each one of these subdivisions "that went into the consolidated company "and thus into the receivers' hands; and if the "Court may and ought to issue receivers' "certificates in order to keep a single line a "going concern, so, having possession of this "system with its various branches, for the same

" reason and by the same means it should keep " each one of them in operation " (fol. 148*g*).

(d) But, even in the improbable event of the Court having intended to signify its disavowal of the obligations created by the lease, the Court, equally with the receivers, would be estopped to repudiate the burdens, while enjoying the fruits, of the contract. The receivers all this time were in the physical possession of the property, collecting its income and deriving every other advantage which that occupation might entail.

In construing the obligation of a railway company and a receiver with respect to an existing contract made by the predecessors of the company, this Court has recently had occasion to say :

" It is not necessary that a party should " deliberately agree to be bound by the terms of " a contract to which he is a stranger, if having " knowledge of such contract, he deliberately " enters into relations with one of the parties, " which are only consistent with the adoption " of such contract."

Wiggins Ferry Co. vs. Ohio & Miss. Ry. Co., 142 U. S., 396, 408.

It is not enough for one occupying leasehold property to say : " I will use this and appropriate its revenues, but not pay rent. If, however, any one demands possession and establishes a right prior to mine, I will yield in his favor." Any trespasser might adopt that attitude ; but surely it would not result in immunity from his legal liability. If the presumption of knowledge of the law is to be acted upon, it could never be more justly applied than in the case of a Court. And in assuming these leases, we cannot but con-

clude that the Court understood the obligations which its receivers were entering upon, and felt the force of the considerations to which the Circuit Judge gave voice in October, 1884, when passing upon a kindred question arising in this very litigation :

" And in this conclusion permit me to say, " generally, in reference to receivers' obligations, " I think the Court should be very slow in " authorizing or directing its receivers to enter " into obligations; none should be created which " the necessities of the case do not absolutely " require. It is not the function of the Court " to go into the business of railroading or manu- " facturing and have property on its hands con- " tinued there indefinitely. Whenever, from the " circumstances of the case, it is found necessary " to take possession of property, it should pre- " serve it and manage it so far as is necessary to " keep it intact and free from loss or injury; and, " if need be, in order so that it may issue re- " ceivers' certificates or direct the receivers to " issue other obligations. Whenever it does so " I think it is the imperative duty of the Court " to see that these obligations, thus authorized " or directed, are held sacred to the very letter " and spirit; that there should not be anything " for outside litigation, but that the Court, hav- " ing *authorized or directed* these obligations and " contracts to be entered into, should see to it " that they are sacredly performed; and, though " afterwards it may seem that these obligations " were unfortunately created or without sufficient " consideration, still there is no duty more sacred " upon the Court than to see that these obliga- " tions are kept."

BREWER, C. J., Wabash, St. Louis and Pacific Ry. Co. vs. Central Trust, 22 Fed. Rep., 271.

Point IV.

THE ERRORS CLAIMED TO EXIST IN THE REASONING OF THE COURT BELOW AND IN THE ARGUMENT OF THE APPELLEES' COUNSEL.

A. THE CIRCUIT COURT'S OPINIONS.

I. The legal proposition embodied in the first point of this brief was conceded by both of the learned Judges who wrote the opinions on the argument in the Circuit Court (fols. 53, 61). The differentiation of the present case, however, seems to have accomplished to their satisfaction because of the anomalous origin of the receivership, and the consequent distinction in what is termed its beneficial character. But the appellants insist, and this contention cannot in their judgment be too strenuously made and reiterated, that there is no foundation, either in reason or authority, for the proposition that a receivership *pendente lite*, once established, is affected by the manner in which the interposition of this extraordinary equity power of the Court was secured. It seems a contradiction in terms to speak of the Court's administration of property in its hands being for any one's special benefit, except according as the respective priorities of all the litigants present, may be determined. This seems to be elementary, and was so recognized by the Circuit Judge when in April, 1885, he denied the application to extend the receivership in the interest of the general mortgage bondholders, for the clearly presented reason that the receivers were "not receivers for either party," but "simply the hand of the Court," and that they would "have no greater power, no different power, would owe "no different duty," however appointed (fols. 149–150). How is it possible to reconcile this with the conclusion

reached in his later opinion? The lease and mortgage of the Quincy, Missouri and Pacific Railroad were prior in time and superior in equity to all of the interests defined by the decree of foreclosure and sale in the action in which the receivers were appointed, and that sale and the title derived thereby were made subject to all rights created by those two earlier contracts. Is not the reasoning employed by this Court in the case of the Union Trust Company against the Illinois Midland Railroad Company, 117 U. S., 434, authoritatively applicable to the present controversy? Mr. Justice BLATCHFORD there said:

"In this connection it is objected that in those cases "the suits were foreclosure suits brought by trustees "under mortgages, and that a different rule should "obtain in a case where the trustees or the bond-"holders do not come into court initially, asking the "aid of equity in the appointment of a receiver. It "is said that the Hervey suit was not such a suit. But "the co-plaintiffs with Hervey were judgment creditors "of the Paris and Decatur Company, with executions re-"turned unsatisfied. The bill set out the precarious con-"dition of all the property held and used by the Illinois "Midland Company, and the necessity for a receiver in "the interest of all the creditors of all four of the corpora-"tions to prevent the levy of executions on such prop-"erty; and it prayed for a judicial ascertainment and "marshaling of all the debts of all the corporations, "and their payment and adjustment as the respective "rights and interests of the creditors might appear, "and for general relief. The plaintiffs set forth that "they represented a majority of the stock in all the "corporations. This bill was quite sufficient to enable "a court of equity to administer the property and mar-"shal the debts, including those due the mortgage "bondholders, making proper parties before adjudging "the merits" (page 458).

* * * * * *

"The terminal expenses and track rentals of the two "roads other than the Paris and Decatur were "always charged by the receivers against the com- "bined Illinois Midland road. The view taken "by the Commissioner and the Circuit Court "was that the receiver took the roads as he "found them, each incomplete, and no one reaching "any important point, and was obliged to continue the "leasing arrangements of the Illinois Midland Com- "pany so as to have a continuous line from Peoria to "Terre Haute, which he operated as an entirety. The "Commissioner stated his conclusions thus: 'In the "'operation of the road no separate accounts of re- "'ceipts or disbursements for each section, nor of the "'amount of business contributed by each section, nor "'of the extent of the use of each road, in the trans- "'action of the various items of business taken at the "'several stations, were kept; nor, indeed, has it been "'possible to keep such accounts. The Paris and De- "'catur road received its share of the benefits accruing "'from the use of the leased lines; the exact relative "'proportion of benefits to each sectional road it is "'impossible to ascertain. The operating expenses "'have been incurred in the management of a single "'undertaking for the common benefit of all parties in "'interest. The use of the several leased tracks was "'necessary for that common undertaking. Without "'the use of the leased tracks the road could not have "'entered either of its terminal points nor the City of "'Decatur, which was equally essential. Neither of "'the sectional roads enters any one of the three main "'points on the line. Indeed, without the leased lines "'the operation of the road, or either of the sections, "'would have been impracticable. And it seems to me "'that the rentals for the use of the leased lines were "'incurred as much for the common benefit as were "'the expenses for employees and supplies "'along the line. If the management of the road had

" ' been so profitable as to have left a net income
" ' to apply on the mortgage debt, the Paris and De-
" ' catur bondholders would have been entitled to their
" ' proportionate share of the income derived from the
" ' use of the leased lines; they could scarcely have ex-
" ' pected that without contributing to the payment for
" ' the use of those lines.' These views apply equally
" to the terminal facilities furnished by the leasing
" roads (page 466).

* * * * * *

" Independently of this, it is entirely sufficient to
" rest our conclusion on the principle that non-action
" on the part of the Paris and Decatur bondholders and
" their trustees, which allowed the Court and the Re-
" ceivers to go on during the entire litigation con-
" tracting debts in respect to the whole line operated as
" a unit, and administering the property as one, under
" circumstances where, as shown, it was and is impossi-
" ble to separate the interests as to expenditures and
" benefits in respect to the matters now questioned, and
" where important rights have accrued on the faith of
" the unity of the interests, amounts to such acquies-
" cence as should operate as an estoppel" (page 468).

II. So far as the Quincy, Missouri and Pacific branch was concerned, the maintenance of the Wabash system as a "going concern," upon which the Circuit Judge justly laid so much stress, produced no practical nor legal benefit, unless thereby the rent reserved as a condition of that maintenance was paid. Under the apportionment adopted by the receivers a large, if not the larger, part of the earnings of this branch went to swell the common fund. And not only was no rent paid, but prior charges, in the shape of taxes, were allowed to accumulate, while the very operation of the road from sheer neglect of necessary repairs, was becoming unsafe. So in July, 1885, a year's default having been made in rental, the trustees applied or a surrender of the

property, in order that it might be both preserved and operated in the interest of its real owners. This was granted by the Court, a transfer of the property made, and the road has ever since been managed as an independent line. What a dead weight the Wabash financiering and its self-imposed receivership were, must be apparent when we consider the score or more of railways which failed, according to the receivers' reports, to earn their operating expenses while in those officials' control. Surely these lines have not all since gone out of existence, as they must have done if that disastrous condition of affairs had continued.

III. There was no public duty imposed by which it was necessary that this branch of the system should be included in the receivership of the Wabash system, nor that it continue to be operated by the receivers, if its value to the system did not exceed its stipulated rent.

It is easy to conceive, in view of the *quasi* public duty of railway corporations, that a receivership of a single line of railway, owned in fee, might be continued for a certain period, even though expenses exceeded earnings. But if that deficit proved continuous, an abandonment would sooner or later become inevitable. Can it be doubted that the debts incurred by the receiver during such a period, would be a preferential charge on the proceeds of the sale of rails, timber, equipment and other removable assets? But in the present case the only property in the hands of the Wabash receivers, was the leasehold interest. If that had been abandoned, the fee in the Quincy, Missouri and Pacific Company would have been undiminished by any lesser estate, and upon it, a solvent, active corporation, would have devolved with equal enforceability an even paramount duty to the public, of exercising, in the public interest, the franchises conferred upon it by its incorporation. As before

remarked, the Wabash receivership was not a philanthropic scheme for the general amelioration of western railways, and neither the Court nor its receivers owed any duty to the public to maintain improvident leaseholds, when a corporation primarily charged with this obligation, stood ready to respond to the demands both of its creditors and of the public.

B. The Untenability of the Appellees' Arguments.

In addition to what has already been presented, there are a few contentions of the appellees' counsel to which we desire briefly to refer *seriatim*.

I. That because in the order of appointment the receivers were directed by the Court to take possession, they cannot be regarded as having exercised an election.

It hardly seems as if this proposition could have been seriously advanced. Is there an instance of a receivership where in the order of appointment the receiver was not, directly or by implication, told to assume control of the subject matter of his appointment? If not so instructed, the office would be futile and his action a trespass. Acting upon well established human tendencies, courts assume that those who ask judicial interposition of this nature, know what is for their own interest, and are seeking to promote that interest.

II. That leases which become obligatory on receivers are only those made by third persons, strangers to the litigation in which the receivers are appointed.

This novel proposition is based upon the idea that by being a party to the Wabash suit the appellant railway company consented to the non-payment of rent.

Three obvious answers suggest themselves :

(a.) There was no default until after possession had been taken and a distinct direction to pay this rent made.

(b.) The proceedings in the cause consistently recognized the prior rights of the lessor. See the orders of April 16th, 1885 (fol. 179), and July 15th, 1885 (fol. 185), the foreclosure decree of January 6th, 1886 (fol. 216), the order of December 31st, 1886 (fol. 264), and the order of March 30th, 1887 (fol. 269).

(c) In dealing with the receivers, parties to the cause as well as strangers, had a right to presume that these officers would respond to their obligations. No inconsistency can be predicated of such a relation. If the appellants had sold coal or other supplies to the receivers, would the purchase price have been irrecoverable ?

III. That the rental which accrued during the occupation of the receivers, was not an operating expense.

But why should it not be so regarded, equally with office, bridge and terminal rentals? The receivers themselves so describe it in their reports, and the instalments due for the use of equipment were regularly charged under that head to the various lines (fol. 142). No complaint was heard during the occupancy of the receivers that this rental was exorbitant, and we can only attribute the default in its payment with other similar charges to a retrospective conclusion that the occupancy had not proved as renumerative as had been expected.

IV. That if not satisfied with the condition of affairs, the appellants should have applied to the Court for a surrender of the road.

1. But the appellants were satisfied with the receiv-

ers' acceptance of the lease, with the consequent liability for the rent, and remained so until substantial waste of the premises, coupled with the rapidly increasing obligations of the receivers, made it prudent to terminate the credit that had been so long extended.

2. It was the duty of the trustees of the "general" and "collateral trust" mortgages to interpose if the contracts continued by the receivers were prejudicial to the interests which these trustees were commissioned to protect. They both assented to the receivership as fully as if the appointment had been made on their own application, and they should have realized that the great benefit reaped from the maintenance of the system, imposed a corresponding burden.

3. As already shown, there was no default upon which to base action until after the receivership had been established, and, so far as the appellant trustees are concerned, this default did not ripen into a possessory right until January 1st, 1885 (fol. 10).

V. That the quarterly reports filed in the cause by the receivers constituted accounts stated.

Even if we assume that these skeleton forms are to be dignified with the title of railway accounts, they were clearly not stated as against these appellants.

(a) For the current information of the Court the receivers were tentatively ordered to keep certain accounts separately, and to make quarterly reports thereof (fols. 120, 121). No issues were framed by these statements, and nowhere in the record have they been treated as being more than accurate summaries of certain figures contained in the receivers' books.

(b) No confirmation of these reports was had until October 10, 1887, and beyond the bare fact of confirmation, the record is silent. By that time not only had the Quincy branch been surrendered to the trustees of its mortgage, but the present petitions of inter-

vention had proceeded to a hearing before a special master.

VI. That the authorities relied upon by the appellees are controlling:

(1) There is, indeed, an intimation in Miltenberger vs. Logansport Railway Company, *supra*, and Kneeland vs. American Loan and Trust Company, *supra*, that the basis of the receiver's liability was not the lease, but a *quantum valebat*. But, in the Miltenberger case, the occupation of the receiver was hardly more than a holding over, while in the Kneeland case, the contracts, as described by Mr. Justice BREWER, "in form were leases, "but, in substance, and properly so adjudged, were "contracts of purchase" (136 U. S., 95). In St. Louis, Alton and Terre Haute Railroad Company against Cleveland, &c., Railroad Company, 125 U. S., 658, it may be added, there was no receivership.

(2) Central Trust Company vs. Wabash, St. Louis and Pacific Railway Co., *In re* Bonner, Intervenor, 30 Fed. Rep., 332, like the instruction given concerning the Havana Division (fol. 1: 0), involved no question of rent. This patent distinction was recognized in the Court's opinion (30 Fed. Rep., 535).

(3) Lehigh Coal and Navigation Co. vs. Central Railroad of N. J., 35 N. J. Equity, 426, presents no conflicting views. The contracts of a receiver are, doubtless, subject to the Court's ratification, but in the present case the operation of the leased railway was unequivocally approved and directed by the Court. Nor does the modification of that decision of the Vice-Chancellor, accomplished by the Court of Errors in reversing his later decision in the similarly entitled case, reported in 41 N. J. Equity, 167, place the question, so far as it appertains to this controversy, in a different light.

Vanderbilt vs. Central Railroad Co., 43 N. J. Equity, 669.

(4) Gaither vs. Stockbridge, 67 Md., 222.

While restating the general rule as to the liability of receivers, the Maryland Court of Appeals held that the few days of a receiver's occupation of leasehold premises before their surrender, did not make him assignee of the term.

(5) Central Trust Co. vs. Wabash, St. Louis and Pacific Ry. Co., *In re* Swayne, Intervenor, 46 Fed. Rep., 26.

This was a proceeding taken in the Circuit Court for the District of Indiana to recover from the Wabash receivers for the rental of the Indianapolis, Peru and Chicago Railroad, and presents substantially all the elements contained in the present appeal. The special master to whom the petition of intervention was referred, following the authority of Brown vs. Toledo, Peoria and Western Railroad Co., 35 Fed. Rep., 444, where the Circuit Judge had passed upon the same question, allowed the claim. His report, however, was set aside by the District Judge, and the petition dismissed. As the opinion under review on the present appeal was followed by Judge Woods, our criticisim of his reasoning may best be made by reference to the body of this brief. In addition, however, it should be observed that the lease of the Indianapolis, Peru and Chicago Railroad was made *subsequent* to the Wabash general mortgage.

Point V.

THE INCOME COLLECTED BY THE RECEIVERS IS PRIMARILY CHARGED WITH THE PAYMENT OF THESE CLAIMS, WITH RECOURSE, IF NECESSARY, TO THE CORPUS OF THE PROPERTY FORMERLY EMBRACED IN THE RECEIVERSHIP.

This proposition accords with the well-established rule of law, and has been recognized by the orders under which the surrender of the Quincy, Missouri and Pacific road was made, and the purchasers at the Wabash sale took possession (fols. 188, 216, 261, 269).

Fosdick vs. Schall, 99 U. S., 235.
Finance Co. of Pennsylvania vs. Charleston, C. & C. Railroad Co., 48 Fed. Rep., 188.
Atkins vs. Wabash, St. Louis & Pacific Railway Co., 29 Fed. Rep., 161, 169.
Kneeland vs. Luce, 141 U. S., 491.

Point VI.

THE CLAIMS FOR UNPAID TAXES AND REPAIRS ARE TO BE GOVERNED BY THE SAME CONSIDERATIONS.

These items have, equally, a twofold support:

I. They are included in the covenants of the lease, were covenants running with the land, and thus became the accepted obligations of the receivers.

Authorities cited in Point I.
Clark vs. Hume, Ryan & Moody, 207.
Hannen vs. Ewalt, 18 Pa. St. 19.
Salisbury vs. Shirley, 66 Cal., 223.
Allen vs. Culver, 3 Denio, 284, 301.

II. They were manifestly operating expenses incurred during the receivership, and were payable out of the funds in their hands by virtue,

(*a*) of the express terms of the order of appointment (fol. 91);

(*b*) of the general rule of law applicable in such cases.

Fosdick vs. Schall, *supra*.

Point VII.

THE DECREE APPEALED FROM SHOULD BE REVERSED, THE PETITIONS OF INTERVENTION GRANTED, AND THE PROCEEDINGS REMITTED TO THE CIRCUIT COURT FOR APPROPRIATE ACTION.

Dated February 29th, 1892.

EDWARD W. SHELDON
Of Counsel for Appellants in Nos. 516 and 620, and for Appellee in No. 626.